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COMMENTARIES

ON THE

JURISDICTION OF COURTS.

BY

TIMOTHY BROWN,

OF THE IOWA BAR.

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PREFACE.

In presenting to the public this work I desire to say that no subject involves more difficulty than the one considered in this volume; as it stands at the threshold of every case that is brought in a court of justice, as well as of every affirmative defense that is set up in the action.

The first question to be considered by the practitioner in the determination of where the action shall be brought is to consider the jurisdiction of the court to try the cause. The attorney must first select the tribunal that has power to try the action, determine whether the venue of the action lies, and the power of the court to act in view of the defense anticipated; and all these questions are subjects of no little embarrassment. If the action be a criminal one, the nature of the offense, its place of commission, the character of the crime, are all intimately associated with the jurisdiction of the court.

When we consider the great number of jurisdictional questions that are annually determined; the constant changes made by the legislatures of the states in statutory law; the code practice adopted in most states, authorizing the joinder of numerous causes of action and defenses; and consequent embarrassing questions growing out of such joinder,— the subject of jurisdiction becomes the more difficult to determine. There are inherent powers connected with every court that constantly give rise to questions of power to act in the particular case before the court and require the determination of intricate questions of jurisdiction. Almost every other question

that ordinarily arises may be cured by agreement, stipulation or waiver; but jurisdiction going to the power of the court can only be conferred by sovereign power.

In preparing this work the writer has not relied on a bare reference to the adjudicated cases upon the question involved, but has taken pains to give extensive extracts from the leading cases cited so the reader may see the pith of the matter decided. This may make a prepared brief on the subject before the court. The author has taken great pains in the selection of authorities, chosen them from the leading courts; and while it is not pretended that all the cases are cited on the subject, it is contended that a sufficiency appears. The work contains fifteen extensive chapters, all carefully looked up, annotated as it may be said, and nearly every question discussed is supported by the opinion of a leading court. The text is greatly abbreviated in order to give space for extensive notes thereto.

With these remarks the writer submits the work to the public.

T. BROWN.

MARSHALLTOWN, IOWA,
January 1, 1891.

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JURISDICTION OF COURTS.

CHAPTER I.

SOURCE OF JURISDICTION.

Jurisdiction defined . . . . . § 1
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§ 1. Jurisdiction defined.— Jurisdiction is the power conferred on a court, by constitution or statute, to take cognizance of the subject-matter of a litigation and the parties brought before it, and to legally hear, try and determine the issues, and render judgment, according to the general rules of law, upon the issues joined, be they either of law or of fact, or both.[1] It does not consist in the declaration of

[1] Ex parte Kinning, 4 C. B. 507; Kinning v. Buchanan, 8 id. 271; 1 Smith's Lead. Cas. 839; Ferguson v. Mahon, 11 Adolph. & Ell. 179, 182-3; Bissell v. Briggs, 9 Mass. 462; Shumway v. Stillman, 6 Wend. 447; Hobart v. Hobart, 45 Iowa, 501; Vaughn v. Congdon, 56 Vt. 111; Perry v. Morse, 57 Vt. 509; Ex parte Bennett, 44 Cal. 84; Lampson v. Platt, 1 Iowa, 558. The court points out the distinction between judgment and jurisdiction as follows: "Between judgment and jurisdiction there is, however, a clear distinction. The one is the decision of the law, given by the court as the result of proceedings therein instituted; the other has reference to the power conferred to take cognizance of and determine causes according to law, and to carry the same into execution. The jurisdiction of the district court in this case is appellate, and not original. When thus acquired the law says it is final; . . . when the law pro-

the right, but the right to declare the law justly; and therefore presupposes that proper efforts have been made to bring into court the parties who are to be affected by its exercise. There must be a right in dispute between two or more parties; a proceeding commenced under the proper rules of the law; process formal in its character served on the opposite party, or parties, to the proceeding; the subject-matter must be one that the court is empowered to hear and determine; the parties must have the right to be heard and be within the jurisdiction of the court; or the property, if that be the subject of the action, must be within such jurisdiction; and the owner or person having the right to claim it, or to be heard, must be notified as required by law of the pendency of the proceeding. The supreme court of the United States has very succinctly defined jurisdiction in the following words: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition, that, on demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether, on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing of a petition containing all the requisites, and in the manner pre-

vides that the district court shall have final jurisdiction it thereby inhibits the jurisdiction of any other appellate tribunal." Riggs v. Johnson County, 6 Wall. 187. "Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court; and the rule is universal, that, if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree." Rhode Island v. Mass. 12 Pet. 718. "The express determination of this court is that the jurisdiction of a court is not exhausted by the rendition of the judgment; consequently a writ of error will lie when a party is aggrieved in the foundation proceedings, judgment or execution of a suit in a court of record." Wayman v. Southard, 10 Wheaton, 23; Suydam v. Williamson, 20 How. 427; United States v. Arredondo, 6 Pet. 709. In Windsor v. McVeigh, 93 U. S. 277, Justice Field says: "A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." Ex parte Cohen, 6 Cal. 318; United States v. Arredondo, 6 Pet. 709.

scribed by law."[1] The exercise of jurisdiction need not be as broad as that laid down above, for the rule there set forth describes a very clear case of jurisdiction; but if there is a petition that is subject to be assailed by demurrer, if so attacked, and the court having its power called in question, or rather in action, decides that the petition is sufficient, even although in law it is insufficient, still the court is exercising jurisdiction; and, although the decision or finding of the court is clearly erroneous, it nevertheless is exercising its judicial power, and its failure to correctly decide on the question of the sufficiency of the petition does not deprive it of jurisdiction; its decision is simply erroneous.[2] If, however, the law conferring the power on the court to act in the matter requires the allegation of a particular fact to exist as a condition to its exercising its power, such fact must be averred, for this refers to and circumscribes the power of the court to act except upon the existence of such fact; as in the law conferring jurisdiction upon the probate court to appoint administrators, executors, the probating of wills, and assuming jurisdiction over estates, the decease of the owner of the estate is a jurisdictional fact that must exist, and unless it in fact exists, as we shall see, there is no jurisdiction.[3] There are three indispensable requi-

[1] United States v. Arredondo, 6 Pet. 709.

[2] A court having jurisdiction to decide whether a case is presented by the pleadings in the mode prescribed by law makes a case that falls within the jurisdiction of the court, and the judgment is not void. Goodman v. Winter, 64 Ala. 433; Shroyer v. Richmond, 16 Ohio St. 455. All questions of pleadings and their sufficiency that the court has the right to pass upon are conclusively adjudicated. Whether correctly decided or not does not become a subject of jurisdictional inquiry. Wright v. Ware, 50 Ala. 557. Jurisdiction is the power to hear and determine a cause, and it exists whenever an officer or tribunal is by law clothed with the capacity to act upon the general abstract questions, so to speak, and determine and adjudge whether the particular facts presented call for the exercise of the abstract power. Woodruff v. Stewart, 63 Ala. 211; Lamar v. Gunter, 39 Ala. 324. Jurisdiction in probate courts attaches upon the filing of a proper petition by the proper person to sell real estate, setting forth the grounds of sale prescribed by the statute; the action of the court granting the order of sale is conclusive as to the existence of debts by decedent as well as the finding that the personal estate was insufficient to pay them. Watts v. Frazer, 80 Ala. 186, 190.

[3] The application to the probate court to sell real estate in payment of debts must comply with the statute authorizing the court to act, and set forth the names of all persons interested in the property sought to be

sites touching the exercise of jurisdiction that always must exist. Judge Story defines them by saying that the court pronouncing judgment should have lawful jurisdiction over the cause (by which he means the subject-matter), over the thing in dispute and over the parties.[1]

§ 1a. Subject-matter.—Jurisdiction over the subject-matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.

Where a court has general criminal jurisdiction it can try any case presented on indictment in the county in which the court is held; but if the evidence showed that the crime was committed in some other county, such fact would show that the prisoner would be entitled to an acquittal, but would not go to the jurisdiction of the court, even if the court should not properly instruct on that fact; but if the indictment on its face showed no offense was committed within the jurisdiction

sold; and if the petition fails in this respect to comply with the statute, this averment being jurisdictional, the proceedings are void, and the purchaser acquires no title, the defect appearing on the face of the petition or record. McCorkle v. Rhea, 75 Ala. 213; Freeman on Void Jud. Sales, § 4; Whitman v. Reese, 59 Ala. 532; Johnson v. Ray, 67 Ala. 603; Robertson v. Bradford, 70 Ala. 385; S. C. 73 Ala. 116. The last case holds that the plaintiff must, however, tender back, even though an infant, the price paid, provided it went to his benefit, or offer to pay it; and the court remarks: "There is no principle of law better settled or resting on wiser considerations of public policy and higher considerations of justice than that no person, whether *sui juris* or under disability — the character of the disability is unimportant — who has received and retains the fruits of a judicial proceeding, can be heard to assail it for irregularity or illegality to the prejudice of others who have in good faith relied and acted upon it as valid. In the application of this principle it is not of importance that the proceeding is void because of want of jurisdiction in the court entertaining and sanctioning it."

[1] See note 1, § 1. Pickens v. Yarborough, 30 Ala. 408; Williamson v. Ross, 33 Ala. 509; Wright v. Ware, 50 Ala. 549; Bell v. Craig, 52 Ala. 215; Bland v. Bowie, 53 Ala. 152; McCully v. Chapman, 58 Ala. 325; Goodman v. Winter, 64 Ala. 410.

of the court, then this averment in the indictment would be one that could be raised by demurrer before the court, as it would show a want of jurisdiction, but it would in no manner prevent the court from acting in disposing of the case before it.[1]

[1] Hunt v. Hunt, 72 N. Y. 225: However, the jurisdiction of the court of another state in which a judgment has been rendered is always open to inquiry in the courts of this state; and if that court has exceeded its jurisdiction, or has not obtained jurisdiction of the parties, the proceedings are *coram non judice* and void. Dobson v. Pearce, 12 N. Y. 156; Kinnier v. Kinnier, 45 id. 535. Or if the judgment has been procured by fraud upon the legal rights of the party against whom it is rendered, it may be questioned collaterally for that reason in the courts of this state. See cases last cited, and Kerr v. Kerr, 41 N. Y. 272. We come now to consider the jurisdiction of the court. It is plain that every state has the right to determine the *status* or domestic and social condition of persons domiciled within its territory. Strader v. Graham, 10 How. (U. S.) 82; Cheever v. Wilson, 9 Wall. 108; Barber v. Root, 10 Mass. 260; Kinnier v. Kinnier, *supra*. So it is that every state may determine for itself for what causes that *status* may be changed or affected, and hence upon what grounds, based upon what acts or omissions of persons holding the relation to each other of marriage, they may be separated and that relation dissolved; and it may prescribe what legal proceedings shall be had to that end, and what courts of its sovereignty shall have jurisdiction of the matrimonial *status*, and power to adjudge a dissolution of that relation. All citizens of that state, domiciled within it and owing to it allegiance, are bound by the laws and regulations which it prescribes in that respect. A text-writer of repute says that "it is the act or acts which constitute the cause of action," which "is the subject-matter in a suit for divorce." See 8 Am. Law Reg. (N. S.) p. 206. And in Holmes v. Holmes, 4 Lans. 388, the learned and able judge who delivered the opinion of the court speaks of the acts relied upon to obtain a divorce as being the subject-matter. The definitions of lexicographers imply a broader scope to the phrase, a more general meaning. It is: "The cause, the object, the thing in dispute." Bouvier, Law Dict. "The matter or thought presented for consideration in some statement or discussion." Webster, Dict. Power given by law to a court to adjudge divorces from the ties of matrimony does give jurisdiction of the subject-matter of divorce. Though the proceedings before that court, from first to last of the testimony in an application for divorce, should show that a state of facts does not exist which makes a legal cause for divorce, yet it cannot be said that the court has not jurisdiction of the subject-matter; that it has not power to entertain the proceeding, to hear the proofs and allegations, and to determine upon their sufficiency and legal effect. Then jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case. See Groenvelt v. Burwell, 1 Ld. Raym. 466, 467. Jurisdiction of the

Where the law confers jurisdiction on the court over the subject-matter of the controversy, such as over all common-law actions, all criminal actions subject to trial on indictment in the county, all equity actions, the abstract question of jurisdiction is whether the cause belongs to the class named; if it does, and the venue is properly laid within the jurisdiction of the court, the court has the abstract power to hear and determine the cause;[1] but jurisdiction of the subject-matter must exist, and every fact essential to its exercise must appear; and hence where the exercise of jurisdiction is dependent on the existence of a particular fact, as we have stated, that fact must appear.

subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases: each in its sphere has jurisdiction of the subject-matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case as in a criminal case; as, for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. We should not say that the court of civil powers had jurisdiction of the criminal action, nor *vice versa*, though each had power to pass upon allegations of the same facts. So that there is a more general meaning to the phrase "subject-matter," in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. Lange v. Benedict, 73 N. Y. 27: What is meant by jurisdiction of the subject-matter we have had occasion to consider lately in Hunt v. Hunt, 72 N. Y. 217. It is not confined within the particular facts which must be shown before a court or a judge to make out a specific and immediate cause of action; it is as extensive as the general or abstract question, which falls within the power of the tribunal or officer to act concerning. Church on Habeas Corpus, sec. 368. See, also, note 2, sec. 52, and cases cited; The People v. Baker, 76 N. Y. 83; People ex rel. Hatzell et al. v. Hall, 80 N. Y. 117.

[1] Jurisdiction is determined by the indictment in a criminal cause. If the court has jurisdiction of the offense therein it is sufficient. The charge made in the indictment is the test; and where the court has acquired jurisdiction of that offense it has jurisdiction to punish for a conviction for any lesser offense included therein. McLean & Pearson v. State, 23 Fla. 281. See Ex parte Donahue, 65 Cal. 474. Venue in criminal cases is a jurisdictional fact to be tried by the court. Davis v. The State, 82 Ga. 205; Rooks v. The State, 65 Ga. 330; Moye v. State, 65 Ga. 754; Day v. State, 68 Ga. 827; Smith v. State, 69 Ga. 768; Dumas v. State, 62 Ga. 58. See § 191, note 1, p. 591, and note 1, p. 594 (Eminent Domain cases).

If real estate can only be sold by a probate court after the personal property in the hands of the administrator is exhausted, the averment that there was not sufficient personal estate to pay the debts would be insufficient, because the court has no jurisdiction until property of a personal nature is actually exhausted; whether it is adequate to pay debts is not a sufficient averment to give jurisdiction, as the law requires it must be applied to the payment of debts, or at least exhausted.[1] The averment is a jurisdictional one; but if the court has the power to grant an order for the sale, although the averment may be insufficient in some matter of form, and the court has the power to act on the question and decide upon its sufficiency, the omitted averment not going to the subject-matter of jurisdiction, then an erroneous ruling does not destroy the jurisdiction.[2] It may be generally stated here that where the averment is not one that goes to the subject-matter of jurisdiction, but to form or substance of the pleading, and not to the power of the court, jurisdiction exists; but if the facts averred do not present a case that the court has power to act on, then the action of the court is *coram non judice* and void.[3]

§ 2. **Boundary — Citizenship.** — No sovereignty can extend its process beyond its own territorial limits, to subject either the property or the person of any one to its judicial decisions, decrees or judgments.[4] Every exercise of authority of this kind would be beyond the power granted, or rather beyond the power of the

[1] See *ante*, page 6, note 1.

[2] Anderson, Law Dict. 580: "The authority of law to act officially in the matter then in hand." Jones v. Brown, 54 Iowa, 79: "If the judgment of the court is one that the court had authority to render in the proceedings in any case, jurisdiction of the cause and parties imports the justice of the judgment where it stands unreversed." Cooper v. Reynolds, 10 Wall. 317; In re Ida Louisa Pierce, 44 Wis. 454; Merrill v. Curtis, 57 Me. 154.

[3] Where the jurisdiction and power to hear a case depends on the existence of the fact, that fact must be alleged or appear on the face of the record or the proceedings are *coram non judice* and void. Where the law provided that real estate could be sold by an administrator after the personal assets in his hands were exhausted, the exhaustion is a potential fact for the jurisdiction of the court. Hays, Adm'r, v. McNealy, 16 Fla. 409. The averment that the assets are insufficient to pay the debts of the decedent is not sufficient averment to give jurisdiction, nor is the necessity of a sale sufficient. See Price v. Winter, 15 Fla. 103.

[4] Story on Conflict of Laws, sec. 539. This rule is elementary. Picquet v. Swan, 5 Mason, 85.

state to grant. All judicial power flows from the state, and the grant of legislative power ceases at the line of the state. Judicial power must cease also at that point; but within the state the power is complete, not only over its citizens, but over the citizens of other states, or foreigners within its borders, even when passing through the state; the law necessarily protecting its own citizens against the stranger's wrongful acts, and also protecting him while he is within its borders. It will also give redress for any grievance he has received while passing through, either from citizen or alien, and enforce any other right he may have — giving him the same relief he would be entitled to were he a citizen. While, therefore, the laws of a state act with equality toward all, the doors of the courts are thrown open for the redress or protection of the stranger and citizen alike. The law therefore properly says that all persons who are found within the state or government are deemed citizens or subjects thereof in this respect; only making general provisions in relation to security for costs, where property rights are asserted, for the protection of its officers. This we say places the non-resident on the same foundation, giving, however, no greater rights, but opening to him the same right to sue that a resident would have.[1]

§ 3. The mode of exercising judicial power.— The law is not without form, and there must be a mode or method of calling the powers of a court into exercise, and hence rules of practice are prescribed by the laws of every state; and if they were omitted, then the rules of the common law would be in force as an adopted rule for bringing the parties before

[1] Story on Conflict of Laws, sec. 541. The general rule of law is, both in England and the United States, that all aliens can bring suits against citizens, or even against other aliens, in all cases where the cause of action arises in the United States; or, if it be a transitory action, arising anywhere. Peabody v. Hamilton, 106 Mass. 220. Any regulation of interstate commerce, whether upon the high seas, or lakes or rivers, or upon railroads or other artificial channels of communication, operates as a regulation of commerce itself. Therefore, a state statute assuming to control and regulate the shipment of freight *from a point within to a point without the state* under an entire contract is *an interference* with the powers of the federal government to regulate interstate commerce, and is unconstitutional. Carton v. Ill. Cent. R. R. Co. 59 Iowa, 148; Kaeiser v. Ill. Cent. R. Co. 5 McCrary, 496; State v. Chicago & N. W. R. Co. 70 Iowa, 162; Wabash, St. L. & P. R'y Co. v. Illinois, 7 Sup. Ct. R. 4; 118 U. S. 557.

the court.[1] Ordinarily there must be a petition or declaration filed in the tribunal having the capacity or jurisdiction to hear, try and determine the particular question involved, and this must set forth a state of facts showing that a controversy exists between the plaintiff and defendant; that the defendant or his property is within the jurisdiction of the court, or may be brought by process within it; that the plaintiff has the right or capacity to sue, setting forth such a right to the subject of the action as gives a sufficient interest in the plaintiff or complainant to bring the suit; or such an interest and right to or in the property of the defendant, or showing, where the action is personal and transitory, that the defendant has property within the jurisdiction; demanding the enforcement of the right or redress for the wrong, or the right to the property or thing, or some interest therein, that is the subject of the action; invoking the aid of the court in the respect out of which the right, grievance or redress arises, and praying the proper relief. There must also be process issued and served under the prescribed forms of the law; a demand of process where necessary; the service must be made in the state, or the property of the defendant brought before the court.[2] This process must be served timely and as provided by the law; then and then only does an undoubted case of jurisdiction appear.[3] Jurisdiction once appearing, the judgment

[1] See *post*, § 53, note 1.

[2] Brownville v. Basse, 43 Tex. 449; Sheldon v. Newton, 3 Ohio St. 494; Grignon's Lessee v. Astor, 2 How. (U. S.) 338; Pennoyer v. Neff, 95 U. S. 727; Gray v. Bowles, 74 Mo. 419.

[3] Morris v. Union Pacific R. R. Co. 56 Iowa, 135. The court: It cannot be disputed that, in order to give the court below jurisdiction, there must have been property seized upon the attachment issued in the case, for the reason that the service of notice was by publication. Garnishment of a debt due the defendant would be a seizure of property on the attachment. If there was no seizure of a debt due the court did not acquire jurisdiction. In Ex parte Watkins, 3 Pet. 207, the court say: "If an erroneous judgment binds the property on which it acts it will not bind that property the less because the error is apparent." Ex parte Lange, 18 Wall. 205; Kendall v. United States, 12 Pet. 633. In this case the following is from the court: "Cases at law and equity as used in the constitution arise where some subject touching the constitution, laws or treaties of the United States is submitted to the courts by a party who asserts his rights in the forms prescribed by law. In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the constitu-

of the court does not depend on the merits of the controversy, but upon the right of the court to determine the issue tendered or made by the complaint, declaration or petition; for if an issue could have been made it is sufficient, treating the pleading filed as the basis therefor.[1]

tion, laws or treaties of the United States, it is within the judicial power confided to the Union." A strict compliance with the requirements of the statute, in all cases of constructive service of process, is necessary to give jurisdiction. If any essential requirement is omitted the court acquires no jurisdiction. Mickel v. Hicks, 19 Kans. 578; Bradley v. Jamison, 46 Iowa, 68; Abell v. Cross, 17 Iowa, 172; Bardsley v. Hines, 33 Iowa, 157; Galpin v. Page, 18 Wall. 350; Bobb v. Woodward, 42 Mo. 482; Drake v. Hale, 38 Mo. 346; Cloud v. Pierce City, 86 Mo. 366. Proceedings wherein parties not within the territorial jurisdiction of the courts are served with process by publication are not in accord with the course of the common law, and are only valid when authorized by statute. Though pending in courts exercising general jurisdiction they are special, and judgments rendered therein stand on the same footing as those of courts of inferior jurisdiction. Denning v. Corwin, 11 Wend. 648; Sharp v. Speir, 4 Hill, 76; Striker v. Kelly, 7 Hill, 9; Thatcher et al. v. Powell et al. 6 Wheaton, 119.

[1] Cole v. Supr. Ct. 63 Cal. 86; Wilgus v. Gettings, 19 Iowa, 82; Wright v. Marsh, 2 G. Gr. 94. In Milne v. Van Buskirk, 9 Iowa, 558, Wright, C. J., said: "If there was an error in fact in permitting defendant (a minor) to appear by attorney, it was an irregularity, and as such no more affected the validity of the judgment than if it had been an error in law. In either case the error, whether of law or fact, does not render a judgment void. The error does not go to the jurisdiction of the court rendering the judgment." Walker v. Sleight, 30 Iowa, 324: An action on a foreign judgment, where the defendant offered to introduce in evidence a complete record of the judgment rendered in favor of the plaintiff to show an error in the amount of the judgment. By the copy offered it appeared that the petition showed only $279.62 due and asked judgment for that amount, while judgment was actually rendered for $523.75. To this evidence the plaintiff objected, and objection was sustained and defendant excepted. Miller, J.: "The question presented in this assignment is whether the amount for which a judgment is rendered, as shown by the duly authenticated transcript, can be contradicted or controlled by the declaration, complaint or petition, showing a different amount to be due the plaintiff. A judgment rendered for more than is claimed by the plaintiff is erroneous, and will be corrected or reversed on writ of error or appeal. But an error in a judgment, whether in law or fact, which does not go to the jurisdiction of the court can only be taken advantage of by writ of error or appeal." Davenport Mut. Sav. Fund, etc. v. Schmidt, 15 Iowa, 213. "When the jurisdiction of a court attaches every presumption is in favor of its validity." Cooper v. Sunderland, 3 Iowa, 114; Morrow v. Weed, 4 Iowa, 77, and

§ 4. Judicial power continued.— Judicial power is the authority vested in the court to hear, try and determine the issues between the parties to the controversy and render a judgment in the case and enforce the judgment it renders. The instrumentalities by which the finding is made rest in the discretion of the tribunal; and while rules of law have been adopted in practice relating to the character, nature, quality and sufficiency of the evidence, these are merely auxiliary, and in no manner affect the validity of the judgment, unless the same is appealed from or corrected by writ of error. The acts of the court, its method of government, its errors in the admission or rejection of testimony, its decision on the questions of fact, operate on the person or *status* of the thing, but in no way affect the judgment or destroy its binding force on the parties to the action.

It does not matter whether the issue be one of fact or of law, the determination of that issue is, by the judgment upon it, valid and binding until reversed by some tribunal which has the right to review the finding in some method pointed out by law.[1] Judgments when rendered after jurisdiction is acquired are conclusively presumed correct, and cannot be disturbed or overcome by evidence contradicting the facts adjudicated, but are regarded as legal verities as between the parties to the action or the *status* of the thing involved in the litigation. Coupled with the power to enter the judgment or decree is the power to issue process for the enforcement of the

numerous authorities; Walker v. Sleight, *supra;* Riggs v. Johnson County, 6 Wall. 187. "The express determination of this court is that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment or execution of a suit in a court of record." See Rhode Island v. Massachusetts, 12 Peters, 718; Wayman v. Southard, 10 Wheaton, 23; Suydam v. Williamson, 20 How. 437. In Wayman v. Southard, above cited, the court said: "The jurisdiction of a court is not exhausted by the rendition of its judgment. Many questions arise on its process subsequent to its judgment in which jurisdiction is to be exercised."

[1] See Kendall v. United States, *supra;* United States v. Arredondo, *supra.* The rule is elementary. See *post,* § 53. State of Rhode Island v. The State of Massachusetts, 12 Pet. 718; Ex parte Cohen, 6 Cal. 318; Wayman v. Southard, 10 Wheat. 23. See *ante,* § 1.

order of the court; for without this power the judgment would be of no validity; and when jurisdiction is once acquired, though the court may suspend the exercise of the power to proceed, the jurisdiction itself is not suspended; the court may again assume jurisdiction of the cause, and its action cannot be collaterally attacked.[1]

§ 5. Jurisdiction over person, property and subject-matter in the state or territory.— Jurisdiction may be divided into three elementary parts. The court must have jurisdiction over the subject-matter of the suit or controversy; it must have jurisdiction over the person of the defendant; and if the action concerns a thing, it must have jurisdiction over the thing. Therefore, the rightful exercise of jurisdiction must be founded either on the person of the defendant being within the territory, or upon the property that is the subject of the controversy being therein, and brought within or under the control of the court. Where the action is a transitory one, and arose either within or without the state, the court has the power to try such action, if the defendant is served with proper process within the jurisdiction of the court, or voluntarily submits to the jurisdiction by appearing in the

[1] In Sanford v. Sanford, 28 Conn. 6, the court say: Where a court has acquired full jurisdiction of a cause it retains it until the cause is absolutely determined. The exercise of jurisdiction may be suspended, but the judgment itself is not suspended; the court may again assume jurisdiction, and its action cannot be collaterally attacked. The record showed that the defendant had been in court and had been served with process and the following entry made by the clerk: "This day came the plaintiff and dismissed this suit; it is therefore considered that the defendant go hence without day and recover of the plaintiff his costs of suit." At the second term thereafter the plaintiff's counsel asked that the cause be redocketed, averring the entry was without his knowledge or assent and made by accident, and the court ordered notice of a motion to be served on defendant or his attorney thirty days before the next term. Afterwards judgment was rendered and entered against the defendant, and it did not appear by the record that notice of the motion had been given defendant. In an action in this state, *held*, that the court did not lose jurisdiction by the entry of discontinuance, but retained it for the purpose of any further proceedings that might be allowed by the court; that the court is presumed to have acted according to the regular practice of the court, and it would be presumed that notice of the motion had been served, and the judgment was declared valid and binding.

action.[1] There are three classes of actions known to the common law, namely: personal actions, mixed actions and real actions, or actions that are local. Ordinarily, at common law, real actions and mixed actions are local, and personal actions are transitory.[2] In personal actions, transitory in their nature, the court having jurisdiction over the subject-matter, where the defendant has property within the jurisdiction of the court, may, by sequestration, attachment or seizure, take jurisdiction of the action, although the defendant be a non-resident of the state, and not served within its limits, to the extent of the property that he has left within the jurisdiction of the court; but beyond that property the judgment of the court would be absolutely invalid.[3] On the other hand, the property of a defendant may be beyond the jurisdiction of the court, and the defendant served within its jurisdiction. In such case the court

[1] "It is indispensable to the binding effect of a judgment that the court has jurisdiction of the subject-matter and of the parties. If the jurisdiction fails as to either the judgment is a mere nullity. The whole doctrine of the binding force and conclusiveness of judgments rests upon the foundation of jurisdiction." Melhop & Kingman v. Doane & Co. 31 Iowa, 400; Rose v. Himely, 4 Cranch, 269; Harshey v. Blackmarr, 20 Iowa, 161; Westerwelt v. Lewis, 2 McLean, 511; Shelton v. Tiffin, 6 How. 163; Wall v. Wall, 28 Miss. 409; Grey v. Hawes, 8 Cal. 562.

[2] Mr. Justice Story, in his Conflict of Laws, section 549, treating of this subject, says: In such cases, for the purposes of the suit, the existence of property within the territory, other than where the defendant resides, constitutes a just ground of proceedings to enforce the rights of the plaintiff, to the extent of subjecting such property to execution upon the decree or judgment. But it is to be treated to all intents and purposes, if the defendant has never appeared and contested the suit, as a mere proceeding *in rem*, not personally binding on the party as a decree or judgment. Story's Conflict of Laws, 461; Lincoln v. Tower, 2 McLean, 473; Phelps v. Holker, 1 Dall. 261; Kane v. Cook, 8 Cal. 449; Woodruff v. Taylor, 20 Vt. 65; Sim v. Frank, 25 Ill. 125. And the place where the service was made may be inquired into under the plea of *nil debet* when sued in another state. D'Arcy v. Ketchum, 11 How. (U. S.) 172; Bissell v. Briggs, 9 Mass. 468. Story on Conflict of Laws, section 538, reads: "In the corresponding distribution of actions by the common law into personal actions, real actions and mixed actions, the two latter are in point of jurisdiction confined to the place *rei sitæ*, and the former are generally capable of being brought wherever the party can be found. Or, as the judicial phrase is, in the common law, real and mixed actions are local; and personal actions are transitory." See, also, 3 Black. Com. 294.

[3] In Cooper v. Reynolds, 10 Wall. 818, Justice Miller announces the

may, by injunction, decree, order or judgment, acting on the person of the defendant only, compel in this manner obedience

opinion of the court in the following words: "Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause. . . . So, also, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officers of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and, in effect, subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which, being incapable of removal and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment or other form of service on a party holding a fund which becomes the subject of litigation brings that fund under the jurisdiction of the court though the money may remain in the actual custody of one not an officer of the court. . . . Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and to subject his property lying within the territorial jurisdiction of the court to the payment of that demand. But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case whether he appears or not. If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such judgment in the same court or in any other, nor can it be

to such judgment, order or decree. The court cannot, however, bind the property of the defendant not within the territorial limits of the court, which in no case, as we have seen, extends beyond the boundaries of the state. Courts as a rule will not restrain citizens of their own state and within their jurisdiction from commencing actions in other states, or outside of their jurisdiction; but there are exceptions to the rule, and when a case is presented where fraud or injustice would result from the commencement of such action, the court may compel a citizen to desist, and, where a proper case is presented, it should act without reference to any refined sense of delicacy, but administer the law and grant the remedy as promptly as in any other case.[1]

used as evidence in any other proceedings not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court in such a suit cannot proceed unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found is the end of the case and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court." See Pennoyer v. Neff, 95 U. S. 714; Harkness v. Hyde, 98 U. S. 476; Brooklyn v. Insurance Co. 99 U. S. 370; St. Clair v. Cox, 106 U. S. 358; Pana v. Bowler, 107 U. S. 545; Hart v. Sansom, 110 U. S. 151; Heidritter v. Elizabeth Oil-cloth Co., 112 U. S. 301; Smith v. Woolfolk, 115 U. S. 149; Renaud v. Abbott, 116 U. S. 277; Applegate v. Lexington, etc. Mining Co. 117 U. S. 271; Freeman v. Alderson, 119 U. S. 188.

[1] In Thompson v. Whitman, 18 Wall. 461, Mr. Justice Bradley, in announcing the decision of the court, said: "Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without, their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence." Judge Story, in his Commentaries on the Constitution, section 1318, after stating the general doctrine established by cases with regard to the conclusive effect of judgments of one state in every other state, adds: "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it, or the right of the state itself to exercise authority over the person or subject-matter." Rose v. Himely, 4 Cranch, 269; Carr v. Lewis Coal Co. 96 Mo. 149. This last case holds, in order to subject particular property to the judgment of a court, that suit brought for that purpose must be brought where the *res* is. La Trobe v. Hayward, 13 Fla. 190; Austin v. Bodley, 4 T. B. Mon. 484; Carrington v. Brents, 1 McLean, 167; Kline v. Kline, 57 Iowa, 386; Cooley's Const. Limitations, 404; Woodworth v. Spring, 4 Allen, 328. The court say: "Every sovereignty exercises the right of determining the *status*

§ 6. Mixed actions where the thing is out of the territory — Also concerning the status of parties — Personal judgments incident thereto.— While this matter will be discussed later in this work, in defining jurisdiction, the court may have jurisdiction over the parties to the litigation, but the action may be such that the thing that pertains to the jurisdiction is beyond the territorial jurisdiction of the court and is not affected by the judgment itself. Hence, if the matter in controversy be a thing, the inquiry may always be made whether the court had jurisdiction over the thing, as the operation of every judgment depends on the power of the court to render it; and the capacity of the court to act upon the thing condemned, arising from its being within or without the jurisdiction, as well as the constitution of the court, may be considered by the tribunal which is to decide on the effect of the sentence.[1] Therefore, in actions where the *status* of the parties is the subject of the strife, the plaintiff being a resi-

or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government. . . . The question whether a person within the jurisdiction of a state can be removed therefrom depends not on the laws of the place whence he came, or in which he may have had his domicile, but on his rights or obligations as they are fixed and determined by the laws of the state or country in which he is found." Carron Iron Co. v. Maclaren, 5 H. L. Cases, 486; Engel v. Scheuerman, 40 Ga. 209; Snook et al. v. Snetzer, 25 Ohio St. 519; Story's Eq. Juris. § 899. Justice Story says: "Although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit." See Dehon v. Foster, 4 Allen, 545; French v. Hay, 22 Wall. 252.

[1] "We think it logically follows, that, where the minor children are non-residents of the state where the divorce proceedings are had, the court acquires no jurisdiction as to their custody, simply because the decree can have no extraterritorial force or effect. In Cooley's Const. Limitations, p. 404, it is said: 'The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the *status* of the complaining party and thereby terminating the marriage, and it might be sufficient, also, to empower the court to pass upon the question of the custody of the children of the marriage, if they were within the jurisdiction; if they

dent of the state and entitled to sue, as in an action for divorce, the court may render a valid decree of divorce that will be recognized by all courts; but, the defendant being a non-resident of the state and only served by publication, or served out of the state with process, a decree would not be binding or valid giving the custody of a child to the plaintiff, if the child was out of the state and the defendant did not appear; and the same rule would apply to a judgment for alimony, if the defendant had no property in the state.[1] So that full jurisdiction, in mixed actions, requires the defendant to be served in the state, unless he appears, the property or *status*

acquire a domicile in another state or country, the judicial tribunals of that state or country would have authority to determine the question of their guardianship there.' Want of jurisdiction is a matter which may always be interposed against an adjudication when sought to be enforced, or when any benefit is claimed for it. The want of jurisdiction either of the subject-matter or of the person of either party renders a judgment a mere nullity." Kline v. Kline, 57 Iowa, 388; Woodworth v. Spring, 4 Allen, 321. See *post*, § 8.

[1] Thompson v. Whitman, 18 Wall. 457. On page 469 the court say: "On the whole we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." (See numerous authorities referred to in this leading case.) Pennoyer v. Neff, 95 U. S. 730. See 1 Greenleaf on Ev. sec. 540; Rose v. Himely, 4 Cranch, 269; Story on Constitution, ch. 29; Hampton v. McConnel, 3 Wheat. 234. "The constitution does not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state." McElmoyle v. Cohen, 13 Peters, 312; Moulin v. Ins. Co. 4 Zabriskie, 222; 1 Dutcher, 57; Price v. Ward, 1 Dutcher, 225; D'Arcy v. Ketchum, 11 Howard, 165; Mackay et al. v. Gordon et al. 34 N. J. L. 286, being a judgment rendered in New York under the statutes of that state, against two persons, one of whom was not served with process. The chief justice says: "Every independent government is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But in the exercise of this power, no government, if it desires extraterritorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus, a judgment by the court of a state against a citizen of such state, in his absence and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign state."

to be affected to be in the state, and the court to have jurisdiction over the subject-matter. In future chapters this will be further discussed.

§ 7. **Mixed actions continued.**— In the common course of proceedings, in many if not all the states of the nation, the statutes give the right, and such right would exist at common law, to a citizen or even a foreigner, to commence proceedings against a person not a citizen, or within the boundaries of the state and not served with process within its limits, by attachment; and in all such cases, for the purpose of the suit, the seizure of the property within the territory gives the court jurisdiction of the proceeding to the extent of subjecting such property to its decree or judgment. But such proceeding, where the defendant has not appeared to contest it, is to be treated, to all intents and purposes, as a mere proceeding *in rem*, and not as personally binding on the party as a judgment or decree *in personam;* or, in other words, it binds only the property seized or attached in the suit to the extent of such property; and the decree or judgment cannot be treated as obligatory upon the defendant, as having extraterritorial force as an obligation.[1] Nor is the judgment evidence of the debt in another state, or even in that in which it was rendered, though the defendant was served out of the state personally, unless he appears in the action and defends. The force of the entire proceeding is spent when the defendant's interest in the attached property is exhausted; and the record of a judgment in another state may be contradicted as to the facts necessary to give the court jurisdiction against its recitals of their existence.

§ 8. **Movable property and immovable.**— We will next consider the subject of jurisdiction where the action is brought purely to recover movable personal property. Such property, movable in its character, is deemed in law as having no *situs* except the domicile of the owner; yet this is but a legal fiction, and is yielding whenever it is necessary for the purpose of justice that its actual *situs* should be inquired into. The state in whose territory any personal property is actually situated has the entire dominion and control over it so far as it relates to sovereignty and jurisdiction, and to the same extent that it has

[1] See *ante*, page 1, note 1.

over the property of its citizens. It may regulate its transfer, subject it to the process of its courts, direct and control its uses and disposition, and limit its use as it may that of its own citizens. Therefore, whenever personal property is seized by mesne or final process, the title acquired under the law of the state to this property, when legally disposed of under such process, is respected and held valid and binding in every other state as fully as it would be in the state where the judgment was rendered.[1] But immovable property is governed in all respects by the law of the state in which it is situated, and no foreign tribunal has any power whatever over it, and all attempts to exercise power are utterly nugatory, and the decree of the court seeking to charge or bind the property is *coram non judice.*

§ 9. Partial jurisdiction of non-residents in mixed actions.— In mixed actions, where the defendant is a resident of the state or served with process within it, then, as a rule, the court has jurisdiction to enter a personal judgment against him, as well as settling the *status* or relation, and property rights, disposing of the entire action. But it often happens that the defendant is not a citizen of the state, and not served with process within its borders, and does not appear in the action. In such cases the court may have jurisdiction *in rem* over the defendant, and a divorce case would be an apt illustration, settling the *status* of the parties, and also entering a

[1] See *ante*, § 6. Also Bissell v. Briggs, 9 Mass. 468; Story on Conflict of Laws, sec. 549; Gelston v. Hoyt, 3 Wheat. 246; Hanley v. Donoghue, 116 U. S. 1; Hall v. Lanning, 91 U. S. 160; Renaud v. Abbott, 116 U. S. 287. Story on Conflict of Laws, sec. 552, says: "Real actions ought to be brought in the place *rei sitæ;* and this is the rule not only when the property in controversy is situate in the same kingdom, but also when the parties, being domiciled in one country, engage in a litigation as to property locally situate in another country. If, therefore, a judgment should be rendered in one country respecting property in another, it will be of no force in the latter. It is true that property within a country does not make the owner, generally, a subject of the sovereign where it is locally situate, but it subjects him to his jurisdiction *secundum quid, et aliquo modo.* Mixed actions, so far as they regard the realty, are to be brought in the place *rei sitæ;* but if the personal damages or claims be separable in their nature and character they may be sued for as personal actions." Watts v. Waddle, 6 Pet. 389; French, Trustee, v. Hay, 22 Wall. 253; McBride v. Harn, 48 Iowa, 151; Broom & Hadley's Commentaries, vol. II, pp. 220, 221, 249. See § 7, *ante.*

decree and granting alimony, fixing the custody of the children in the plaintiff. In such case, if the child was not within the territory, the decree would not be binding, and could have no effect upon it. And the state in which the child was situated would respect the decree of the court so far as the granting of the divorce was concerned; but the decree would have no binding effect in the neighboring state so far as it related to the custody of the child. So, also, while the judgment for alimony might reach the property of the defendant within the state, it would be absolutely nugatory in any other state. There are various actions relating to the establishment of rights and affecting the *status* of real property that are in their nature mixed, such as actions of ejectment and claims for an accounting for rents and profits, and all other actions *in rem* where a personal judgment may also be rendered, where the same rule would apply.[1] There are also

[1] In Kline v. Kline, 57 Iowa, 388, Justice Rothrock, in announcing the opinion of the court, says: "A suit for divorce in its nature makes the husband and wife contending parties, and the legal fiction of a unity of person and of domicile by reason of the marriage is destroyed by the law which authorizes the action. The husband procured his decree on service by publication after the wife, with the two children, had been residents of this state for more than two years. Under the circumstances we think the better rule is that the court in Wisconsin had jurisdiction to declare the *status* of the parties before it and grant the divorce, but that the decree in excess of this was void for want of jurisdiction. Suppose that a husband should desert his wife and remove to another state, taking his property with him, and she should make her application for divorce and alimony, and make service by publication, and take her decree without any appearance by the defendant,—no one would claim that a money judgment for alimony could be enforced in such case in a foreign jurisdiction. And yet, in a certain sense, the court has jurisdiction of the defendant, but it is only for the purpose of changing the *status* of the complaining party and terminating the marriage." In Cooley's Const. Limitations, p. 404, it is said: 'The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the *status* of the complaining party, and thereby terminating the marriage, and it might be sufficient, also, to empower the court to pass upon the question of the custody of the children of the marriage, if they were within the jurisdiction; if they acquire a domicile in another state or country the judicial tribunals of that state or country would have authority to determine the question of their guardianship there.' The same doctrine is laid down in Woodworth v. Spring, 4 Allen, 321; Van Orsdal v. Van Orsdal, 67 Iowa, 35. Actual service of process upon a non-resi-

some actions, in their nature personal, which must be brought in the forum *rei sitæ*. Among the latter actions are trespasses for injuries to real property, which are always deemed in law local; and an action will not lie except in the territory within which the property is situated. So, also, in the action for nuisance, the undoubted rule is that, where the injury produced by the nuisance is to real property, the action will lie in the place where such property is situated. If, however, the injury be to the person or personal property of the plaintiff, whether the action be for trespass or nuisance, the action is transitory.[1] When we come to consider actions local and

dent out of the state confers no jurisdiction other than that acquired *in rem* on or against the attached property. Weil v. Lowenthal, 10 Iowa, 575; Bates v. Chicago & N. W. R. Co. 19 Iowa, 260; Lutz v. Kelly, 47 Iowa, 307; Hakes v. Shupe, 27 Iowa, 465; Darrance v. Preston, 18 Iowa, 396. The same rule applies where fraud, false pretenses or abuse of process renders the service in the state bad, if defendant is procured to come within the jurisdiction by that means. Dunlap v. Cody, 31 Iowa, 260; Mooney v. U. P. R. Co. 60 Iowa, 346. See *ante*, note 2, § 8; Morris v. Union Pac. 56 Iowa, 186.

[1] Barnes v. Davis, 2 Iowa, 160; Chapman v. Morgan, 2 G. Gr. 374; Ham v. Rogers, 6 Blackf. 559; Iowa Loan & Trust Co. v. Day, 63 Iowa, 459; Chabourne v. Gilman, 29 Iowa, 181; Elder v. Hilzheim, 35 Miss. 243; Gordon v. Merry, 65 Me. 168. In this action the court says: "The action of trespass, though a personal action, is, as we have seen, when it is brought for the recovery of damages for an injury to the realty, not transitory but local." Whidden v. Seelye, 40 Me. 247, was an action in trover for personal property after it was severed from the land, and the injury to the realty was not the gist of the action, and it was held to be both personal and transitory. In the matter of enjoining a nuisance, in Keyser v. Coe, 9 Blatchford, 33, where a manufactory was located on Goose island, near the state of Connecticut, whence the noxious odors were blown to the plaintiff's residence in the state, injuring the health of his family, destroying their general comfort and impairing the value of the property, on argument of a bill to enjoin the nuisance, it was held that if even Goose island were outside of the limits of the district of Connecticut, yet as the odors were wafted to the shore and there inflicted the injury, the offense was thereby within the jurisdiction. In Sumner v. Finegan, 15 Mass. 284, it is held the venue is local where the action is on the case and must be proved to have been done in the county where the venue is laid. Where, however, an injury has been caused by an act done in one county to land, etc., situated in another, the venue may be laid in either. Bulwer's Case, 7 Rep. 1; Sutton v. Clarke, 6 Taunt. 29; Thompson v. Crocker, 9 Pick. 59, an action for flowing back the water on plaintiff's mills in the county of Plymouth by a dam which was in the county of Bristol, and it was supported in the county of Plymouth. The venue might have been laid in either county, as shown

transitory in their nature we shall give this question more careful attention.

§ 10. Subject-matter — Jurisdiction of.—Either the laws or the constitution of the state must define the jurisdiction of the court as to the subject-matter. It cannot be derived from any other source. The parties cannot confer jurisdiction of the subject-matter by consent. This is an established maxim of the law, the true interpretation of which is that the consent of the parties cannot empower the court, but the law must empower it, to act upon the subject-matter upon which it gives judgment. The court is the creature of the law, and upon considerations of general public policy the law defines, limits, extends or restricts its jurisdiction, and the acts of the parties can neither enlarge nor restrict its powers by consent. Therefore it may be safely laid down as a fundamental rule that when a court has no jurisdiction of the subject-matter of a controversy, even although the party made no objections thereto, the person affected by its judgment is at liberty to repudiate its proceeding and refuse to be bound thereby.[1] Although the proceeding may be by consent, the defendant may have voluntarily appeared to the action and entered no protest and may have pleaded to the merits, the rule is still the same. It may be further said that where the court has no jurisdiction of the subject-matter of the controversy the defendant may avail himself at any stage of the proceeding of this want of power; and any maxim that requires one to move

by the last two cases. See Oliphant v. Smith, 3 Penn. 180. Where the wrong done was stopping the flow of the water by an obstruction or drain in one state to the injury of a mill in another state, in a just sense the wrong may be said to be done in both states. Slack v. Walcott, 3 Mason, 508; Watt's Adm'r v. Kinney, 23 Wend. 484; S. C. 6 Hill (N. Y.), 82. See *post*, § 32, note 2.

[1] Michales v. Hine, 3 G. Gr. 470; Andrews v. Wheaton, 23 Conn. 116; Cottrell v. Thompson, 15 N. J. L. 345; State v. Bonney, 34 Me. 225; Dicks v. Hatch, 10 Iowa, 384; Richardson v. Hunter, 23 La. Ann. 257; Cerro Gordo Co. v. Wright, 59 Iowa, 485. The court cannot be divested of jurisdiction by consent. Muldrow v. Norris, 56 Am. Dec. 316; In re Sawyer, 124 U. S. 220. "Whenever a court has jurisdiction it has a right to decide every question which occurs in the cause. . . . But if it acts without authority, its judgments and orders are nullities. They are not voidable, but simply void." Elliott v. Peirsol, 1 Pet. 328-340; Wilcox v. Jackson, 13 Pet. 498, 511; Hickey v. Stewart, 3 How. 750; Thompson v. Whitman, 18 Wall. 457; § 1, *supra*.

promptly in order to take advantage of an irregularity has no application here, since this is not a mere irregularity but a total want of power to act in the premises at all. The law goes still further than this. Whenever the court lacks jurisdiction of the subject-matter, it may on its own motion, or when its attention is called to the fact, refuse to proceed further and dismiss the action. This would apply to branches of the case independent in their character or to any matter which in its nature went to the jurisdiction of the court relating to the subject-matter of the controversy.[1] But the subject-matter

[1] Dicks v. Hatch, 10 Iowa, 384. The statute gave a justice of the peace jurisdiction of the action of forcible entry and detainer of real property on two grounds: First, when the defendant, by fraud, intimidation or stealth, entered upon the prior actual possession of another; second, when the defendant was a tenant of another, and held over, after and contrary to the terms of his lease, after notice to quit had been served on him. The action was commenced before the justice on the first-named ground, a trial had and an appeal taken. The district court to which the action was appealed had no original jurisdiction, but only appellate jurisdiction. On appeal the plaintiff amended his petition, setting up the second ground for the action also, and an issue was joined and cause tried. On appeal the court say: "The justice alone had original jurisdiction in this summary proceeding, and the district court can obtain jurisdiction in no other way than by appeal. The case then, of course, must be tried in the district court upon the same issues upon which it was tried in the justice's court. If it is tried otherwise, that is, if the issue is materially changed by amendments, and thus tried, the district court assumes to itself jurisdiction which it has not in this class of cases. It may be considered that the district court is a court of general jurisdiction, and its acts are presumed to be correct; but whilst this is true, the doctrine holds good, that, when the record shows that the court had no jurisdiction over either the person or the subject-matter, the judgment is void and may be impeached either collaterally or in any other manner in which the question may arise." In Smiths v. Dubuque Co. 1 Iowa, 492, the court say: "It is insisted here that no question having been made before the county court as to its authority to entertain the application, that the objection came too late for the first time in the district court, and therefore should have been disregarded. Whether this is or is not so depends upon the question whether the county court had or had not jurisdiction over the subject-matter of the application at the time and in the manner it came before it. For if it had such jurisdiction, any objection as to the regularity of the proceeding merely, not made before the court, should be regarded by the district court as waived. But no failure to object could confer upon the court a power to hear and determine a subject-matter which it was not authorized to try. In other words, consent could not confer such jurisdiction." See Easton v. Fleming et al.

of the controversy does not relate to the particular case before the court, but whether the court has power to try an issue involving the same subject, as in an indictment for murder alleged to have been committed in "A" county, the court having general criminal jurisdiction to try it; and if the evidence showed the crime was committed in "B" county, this would be a failure of proof of the allegation of venue, but not a question that could be raised by *habeas corpus* before the trial or after, but should be raised on appeal.

§ 11. Subject-matter — Non-residents.— In order to arrive at the correct rule of law pertaining to jurisdiction over non-resident defendants, not served with process in the state, except by publication, posting notice, or such other substituted service as may be provided for by the statute,—and provisions as to the mode and manner of service vary in different states,—

51 Iowa, 305; O'Hagen v. O'Hagen, 14 Iowa, 268; Walters v. S. B. Mollie Dozier, 24 Iowa, 192. The jurisdictional question may be raised for the first time in the supreme court. Cerro Gordo County v. Wright County, 59 Iowa, 486. The court says: "It is undoubtedly true that consent of the parties cannot give the court jurisdiction over the subject-matter of the action. In Groves v. Richmond, 53 Iowa, 570, this court on its own motion took notice of and determined such question." Where proceedings were commenced to foreclose a mortgage in a county other than where the land was situated (Orcutt v. Hanson Ex'x et al. 71 Iowa, 517), where the circuit court alone had appellate jurisdiction and the appeal was taken to the district court (Schuchart v. Lammey, 62 Iowa, 199; Keniston v. Hewitt, 48 Iowa, 679), where the particular condition or *status* of the defendant is made a jurisdictional fact, this condition cannot be dispensed with. Davidsburgh v. Knickerbocker L. Ins. Co. 90 N. Y. 526; Robinson v. Oceanic Steam Nav. Co. 112 N. Y. 324; McCormick v. Penn. R. Co. 49 N. Y. 303. For additional authorities see Andrews v. Wheaton, 28 Conn. 112; Dodd v. Cady, 1 Minn. 289; Ginn v. Rogers, 9 Ill. 131; Brady v. Richardson, 18 Ind. 1; Green v. Collins, 6 Ired. L. 139; Bostwick v. Perkins, 4 Ga. 47; Georgia, etc. Co. v. Harris, 5 Ga. 527; Montgomery v. Heilman, 96 Pa. St. 44; Walker v. Ivey, 74 Ala. 475; Fahs v. Darling, 82 Ill. 142; Smith v. Myers, 109 Ind. 1; Thayer v. Montgomery, 26 Vt. 491; Spear v. Carter, 1 Mich. 19; Att'y-Gen. v. Moliter, 26 Mich. 444; Thompson v. Mich. Mut. Benefit Assoc. 52 Mich. 522; Dumont v. Fry, 12 Fed. Rep. 21. In Cooper v. Reynolds, 10 Wall. 316, the court say: "By jurisdiction over the subject-matter is meant the nature of the cause of action, and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred." See also, generally, *In re* Bogart, 2 Sawy. 401.

or where service is personal without the state, which rests on the same platform and is entitled to the same respect and no greater except as to the time given to open the default, it must be remembered that the state has no power by organic law or legislative enactment over non-residents of its territory not served with process within its borders, and can grant none to its courts; but it has power over all property, real or personal, within its borders. Personal property has no *situs*, and when within the territorial jurisdiction of the court may be seized by attachment, replevin or other process, either for the settling and quieting the title to it, establishing an interest in it, enforcing a lien upon it, or subjecting it to the payment of a debt the non-resident owner owes the plaintiff. The title, right, interest in, or lien upon, may by action be enforced by bringing the property before the court or under its control, and the notice or process may be served by publication, or outside of the state upon the defendant as directed by statute; and the judgment entered in all respects, so far as the interest of the defendant is concerned, is the same as though he was a resident; but the jurisdiction is limited to the property, and as against that property the effect is the same as though the defendant was a resident. If the action is in replevin, the adjudication of title has the same force and effect as though the defendant was a citizen. But the remedy is confined to the property, and the judgment for damages for unlawful detention would be invalid, unless there was property attached; and so as to costs. In an action for divorce, the children, the fruit of the marriage, if in the state, are wards of the court, and the court, in the protection of its citizens, could fix their custody and give it to the resident parent if it desired and deemed it just. It could not give alimony unless the defendant's property was under the control of the court, against a non-resident defendant not served or appearing, nor fix that of children out of the state. In actions relating to the title in, right to, lien upon, or rents growing out of, real estate, or any interest therein, the property being *rei sitæ*, the action should be the same, and be commenced in the same manner as local actions against residents, and the action would be *lis pendens*, and would be conducted in the same manner as ordinary actions of that kind; and the jurisdiction is the same, but the remedy is confined

strictly to the property in controversy, and every right under the law that is confined to the property may be settled by the court; but if the action is such that damages are claimed aside from the property right, the jurisdiction ceases as to that. The personal judgment has the same force out of the state and no greater than within.[1] The rule as to jurisdiction is limited to the same line in the state as out of it; the respect given to the judgment is the respect it is entitled to at home. With respect to service, the statute must be complied with; the mode of service must be in accord with the direction, and without such service the judgment is invalid.

[1] See *ante*, §§ 7, 8, 9, and notes. In Boswell's Lessee v. Otis, 9 How. 336, the court said: Jurisdiction is acquired in one of two modes: first, against the person of the defendant by the service of process; or secondly, by the procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceedings against the property be by attachment or bill in chancery. Webster v. Reid, 11 How. 437; Borden v. Fitch, 15 Johns. 121; Harris v. Hardeman et al. 14 How. 334; Smith v. McCutchen, 88 Mo. 415; Mitchell, Adm'r, v. Gray, 18 Ind. 123. But see also dissenting opinion of Justice Hunt in Pennoyer v. Neff, *supra*, on this subject, where many respectable authorities are cited.

CHAPTER II.

POWER FROM WHICH JURISDICTION FLOWS.

Courts represent sovereignty — Some courts are of limited and some of general jurisdiction — Court always limited to the power granted it § 12

Constitutional and statutory limitations — Where constitution gives power, legislature may prescribe practice — Legislature may enlarge constitutional powers of the court — Cannot restrict the power — Power restricted to the boundary of the state or government — Power exercised at the place appointed by law — Exercise confined to the issue — Appellate jurisdiction can only be exercised through appeal — Sometimes initiatory steps must be taken before jurisdiction attaches — Sometimes claim must be presented for allowance — Jurisdiction *in rem* — Jurisdiction over minors, lunatics, idiots, etc. — Summary power derived only from statute specially exercised . . 13

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Executive and legislative jurisdiction is a prerogative — Officer cannot waive or consent to jurisdiction of court — Court cannot exercise jurisdiction over — Executive officers cannot surrender defenses pertaining to the office — Matters that may be waived — Where one appeals from a court having no jurisdiction — Neglect sometimes amounts to waiver 18

Party may waive a personal privilege — May waive jurisdiction by not pleading want of it — By going to trial — Laches is not a waiver of jurisdiction of subject-matter — Want of jurisdiction over subject-matter cannot be waived 18a

§ 12. Courts represent sovereignty.—Jurisdiction, being the power to judicially administer the law, must emanate from the sovereign power of the body politic it represents; it was originally derived from the crown.[1] Originally the sovereign was, in contemplation of law, supposed to be present in court, or at least was there represented by the judges, whose power was but an emanation of the royal prerogative.[2] For the more speedy and impartial administration of justice between subject and subject the law has appointed various courts, some with limited and others with general jurisdiction; some constituted to inquire only; others to hear and determine in the first instance, and yet others to hear only on appeal and review the acts of other courts.

A court has no authority to do an act unless expressly or impliedly authorized by the supreme power of the state; the word "state" applies to the nation, as well as the states that compose it. Courts may be established and their jurisdiction defined by the constitution or organic law of the state, or by legislative enactment. Generally, however, jurisdiction proceeds from statutory power granted, except where it is given by the constitution, of which the supreme court of the United States is an example;[3] and the statutes prescribe the manner in which the court shall be conducted and the form and procedure, and appoint or provide for the appointment or election of judges and subordinate officers, as well as the method or rules of procedure governing them.[4] There are no courts in this country except those so created.

[1] 2 Broom & Had. Com. 20; 1 Blackstone, ch. 7; Co. Litt. 260; Withers v. Patterson, 27 Tex. 495; Belcher v. Chambers, 53 Cal. 642.

[2] 2 Broom & Had. Com. 20; Co. Litt. 260.

[3] Constitution of the U. S. art. 3, secs. 1, 2. Of all the courts which the United States may, under their general powers, constitute, one only, the supreme court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. United States v. Hudson, 7 Cranch, 32; United States v. Clarke, 8 Peters, 444; United States v. Eckford, 6 Wall. 488; United States v. Cruikshank, 92 U. S. 564; State v. Wheeling Bridge Co. 13 How. 563.

[4] Constitution of the U. S. art. 3, sec. 2. "The supreme court has no appellate jurisdiction confided to it in criminal cases by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the circuit court, in any case where a party has been convicted of a public offense. . . . The only objection is not that the court acted beyond

§ 13. Constitutional and statutory limitations.— Where courts derive their powers from the constitution of the state or nation, although in general terms, leaving it to the legislature to prescribe the form of procedure and rules governing them, if there be no restriction on the powers so conferred, the legislature may by statute enlarge them, and establish other courts of concurrent jurisdiction with the one created by the fundamental law, provided the constitutional powers of the latter are not molested or interfered with.[1] It is only where the partic-

its jurisdiction, but that it erred in its judgment of the law applicable to the case." Ex parte Kearney, 7 Wheat. 42. See Rhode Island v. Massachusetts, 12 Pet. 657; McBride v. Hoey, 11 Pet. 167. But where the order of commitment for contempt is a nullity because the court was without jurisdiction of the offender, the court may act and discharge. Ex parte Terry, 128 U. S. 303–4; Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Siebold, 100 U. S. 371; Ex parte Fisk, 113 U. S. 713–718; Fox v. Ohio, 5 How. 410; Ableman v. Booth, 21 How. 506; Cohens v. Virginia, 6 Wheat. 378.

[1] "The constitution, it is true, declares that 'the judicial power is vested in one supreme court, in circuit courts, in probate courts and in justices of the peace.' But it also in the same section declares that 'municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.' This is a plain reservation to the legislature of the power to carve out of the judicial power vested in the other courts named such authority as it would be proper to confer upon city courts, and to create such courts for its exercise." Covell v. Treasurer, 36 Mich. 332. For a full discussion of legislative power to create inferior courts and define their jurisdiction, see State v. Mayor of Charleston, 12 Rich. (S. C.) 480; State v. Helfrid, 2 Nott & McCord, 233. For a strong case, see State v. Young, 3 Kan. 445, where a provision in the organic act that the judicial power shall be vested *exclusively* in a supreme court, district, probate and justice courts, was held not to prohibit the legislature from establishing municipal courts for the enforcement of municipal regulations, ordinances and the like. This is the correct rule. Shafer v. Mumma, 17 Md. 331; Hutchings v. Scott, 4 Halst. (N. J.) 218; Seale v. Mitchell, 5 Cal. 403. In Harris v. Vanderveer's Executor, 21 N. J. Eq. 424, the constitution stated that the judicial power shall be vested in certain courts, naming them, and such inferior courts as now exist and as may be hereafter ordained, and by a later clause expressed that it is further ordained that "the several courts of law and equity, except as herein otherwise provided, shall continue with the like powers and jurisdiction as if this constitution had not been adopted." The clause bestowing jurisdiction reads as follows: "The judicial power shall be vested in a court of errors and appeals in the last resort *in all causes as heretofore*" (naming several courts). Held, that the words "as heretofore" did not refer to the antecedent word "causes," and the legislature could enlarge the jurisdiction given by the constitution.

ular jurisdiction is given exclusively to a designated court by the constitution that the legislature is prohibited from conferring the same power on another court.[1] The jurisdiction of a court means the power conferred upon it, by the constitution or statute, to act within the prescribed limits, not exceeding the boundaries of the government creating it, over property within the state, citizens of the state, or persons coming within its jurisdiction, in relation to a subject-matter within the scope of the powers conferred upon it, to hear and determine, in the manner and at the place appointed by law, the issues between the parties, or any matter so lawfully brought before it.[2] It

Every intendment must be made in favor of legislative power; the courts with great unanimity have laid down a rigid rule on the subject. Chief Justice Marshall, in 6 Cranch, 128, Chief Justice Parsons, in 5 Mass. 534, Chief Justice Tilghman, in 3 S. & R. 72, Chief Justice Shaw, in 13 Pick. 61, and Chief Justice Savage, in 1 Cow. 564, have with one voice declared, "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

[1] See Perkins v. Corbin, 45 Ala. 118; Milhau v. Sharp, 17 Barb. 437; S. C. 28 id. 228; Water Co. v. Vallejo, 48 Cal. 72; Bors v. Preston, 111 U. S. 260; Davis v. Packard, 7 Pet. 276–284; Graham v. Stucken, 4 Blatch. 50; Ames v. Kansas, 111 U. S. 467. In Bors v. Preston, *supra*, the court say: "The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court does not of itself imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter."

[2] No state can, by its laws, directly bind property beyond its limits. Wimer v. Wimer, 82 Va. 900. In this case the court say: "Now, it is a fundamental maxim of international jurisprudence that every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory; and the direct consequence of this rule is that the laws of every state affect and bind directly all property, whether real or personal, within its territory. Another consequence of this maxim is that no state can, by its laws, and no court which is but a creature of the state can, by its judgments or decrees, directly bind or affect property beyond the limits of that state; and hence it is axiomatic that no writ of sequestration or execution, or any order, judgment or decree of a foreign court, can be directly enforced against real estate situate without the limits of the foreign state." No state has jurisdiction over lands or personal property outside its limits. Farmers' Loan & Trust Co. v. Postal Tel. Co. 55 Conn. 334. In Watkins v. Holman, 16 Pet. 57, McLean, J., says: "A

ordinarily may enforce its judgments within its territorial limits by execution. It may have original or appellate juris-

court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself nor the conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." In Booth v. Clark, 17 How. 322, the same court say, speaking of a receiver under a creditor's bill: "He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property," See Piedmont Coal, etc. Co. v. Greene, 98 Am. Dec. 799, and note; Page v. McKee, 96 Am. Dec. 201, and note. Jurisdiction, as applicable to a state, is the authority to declare and power to enforce the law as well over the territory within which such power and authority may be exercised, and the jurisdiction of a state is co-extensive with its sovereignty. Sanders v. St. Louis, etc. Anchor Line, 97 Mo. 26; Bassick Mining Co. v. Schoolfield, 10 Colo. 46. In the case of Buck v. Colbath, 3 Wall. 341, the following remarks of Justice Miller, in announcing the opinion of the court, are important and terse: "That principle is that, whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. This is the principle upon which the decision of this court rested in Taylor v. Carryl, 20 How. 583, and Hagan v. Lucas, 10 Pet. 400, both of which assert substantially the same doctrine. . . . This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes, to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not." See Day v. Gallup, 2 Wall. 97, as to last clause after possession was ended. In Rio Grande Railroad v. Gomila, 132 U. S. 478, the court applied the rule where the property of the defendant had been attached, and he afterwards died; holding that the probate laws of a state, which, upon the death of a party to a suit in the federal court, withdraws his estate from the operation of the execution laws of the state, and places it in the hands of his executors or administrator for the benefit of his creditors and distributees, do not apply when, previous to the death of the debtor, his property has been seized upon execution, and thus specifically appropriated to the satisfaction of the judgment of a court. See Covell v. Heyman, 111 U. S. 176; Riggs v. Johnson County, 6 Wall. 166. See *ante*, p. 12, note 1.

diction, or both.[1] If its jurisdiction be appellate only, it has no authority to act except through an appeal from the court having original jurisdiction, even although the appellate court had such jurisdiction of the subject-matter; nor will consent of the parties confer it, or failure to raise it in the court below.[2] Sometimes initiatory steps must first be taken before a body or tribunal that has some power, exclusive in its character, over the matter in controversy, such as assessing damages for right of way, levying taxes, fixing rates of assessment, or per-

[1] Where the right to appeal is given to the circuit court that has exclusive jurisdiction, the district court has no jurisdiction on a change of venue. Sayles v. Deluhrey et al. 64 Iowa, 109. Where a justice of the peace erroneously entertains an action, of the subject-matter of which he has no jurisdiction, the circuit or appellate court will not acquire jurisdiction by the appeal, although it may have original jurisdiction. See Smiths v. Dubuque County, 1 Iowa, 492; McMeans v. Cameron, 51 Iowa, 691; Boyer v. Moore, 42 Iowa, 544; Gates v. Wagner, 46 Iowa, 355; Davis v. Packard, 7 Pet. 281; Dudley v. Mayhew, 3 N. Y. 9; Walters v. Steamboat Mollie Dozier, 24 Iowa, 192; Roland v. Brock, 29 Iowa, 284.

[2] Cerro Gordo v. Wright, 50 Iowa, 439; White v. Polk County, 17 Iowa, 413. But presenting the claim and waiting a reasonable time for the tribunal to act, is sufficient, and the board or officer, court or body, cannot prevent suit by failing to act on the claim; the party, having done his duty, cannot be defeated by the failure of the auditing board or tribunal to do its duty. Ferguson v. Davis County, 57 Iowa, 601. In Macklot v. City of Davenport, 17 Iowa, 387, the following rule was laid down by the court: "It may, therefore, be safely held that where a statute upon a particular subject has provided a tribunal for the determination of questions connected with that subject, that the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested; and that generally where a statute in relation to revenue provides a tribunal for the correction of the errors of the officers by a proceeding in the nature of an appeal to it, that such *quasi* appellate jurisdiction is exclusive." As applied to fences and fence viewers, see Lease v. Vance, 28 Iowa, 509; as to the change of grade of a street, Cole v. City of Muscatine, 14 Iowa, 296. In the last case there was no common-law remedy. Richardson v. Milburn, 11 Md. 340; Ind. School Dist. of Oakville v. Ind. School Dist. of Asbury, 43 Iowa, 444. Whenever any person has authority to hear and determine any question, such determination is in effect a judgment, having all the incidents and properties attached, and is an estoppel on the parties lawfully before it as much as any other judgment. Freeman on Judgments, sec. 531. See as to different tribunals note 2 p. 54; also see Downer v. Lent, 6 Cal. 94; People v. Hagar, 52 Cal. 182; Clark v. Brown, 18 Wend. 221; Howe v. Newbegin, 34 Me. 15; Shannon v. Frost, 3 B. Monr. 258; Ela v. Smith, 5 Gray, 135; Dynes v. Hoover, 20 How. (U. S.) 65.

forming some *quasi* judicial act that must be done before the court can take jurisdiction, and can only acquire it by appeal from such inferior tribunal, though its action thus put in motion gives it power to retry the issues as an original proceeding; and where the statute requires it, the claim must be presented for payment or allowance to some board or tribunal. Such presentation must be made and claim filed before suit, in order that judicial cognizance may be taken of the matter.[1] Many statutes give courts power to authorize persons, usually officers designated by them, to do acts affecting the rights of parties in relation to things, as well as over things which are within its jurisdiction, known as proceedings *in rem*, when the matter is brought before the court in the manner by law pro-

[1] In Runkle v. United States, 122 U. S. 555, the court say: "A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. In Ex parte Watkins, 3 Pet. 207, the court ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally;' to give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. Dynes v. Hoover, 20 How. 80; Mills v. Martin, 19 Johns. 33. In Brown v. Keene, 8 Pet. 115, Chief Justice Marshall says: 'The decisions of this court require that averment of jurisdiction shall be positive,—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' . . . As the sentence now under consideration involved the dismissal of Runkle from the army, it could not become operative until approved by the president after the whole proceedings of the court-martial had been laid before him. The important question is, therefore, whether that approval has been positively shown. The court of claims has found as a fact in the case that the proceedings, findings and sentence of said court-martial were transmitted to the secretary of war, but it has not found that they were laid before the president or acted on by him, otherwise than may be inferred, argumentatively, from the orders of the secretary of war, and the subsequent action of President Grant and President Hayes. Here, however, the action required of the president is judicial in its character, and not administrative. . . . This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case if he had been one of the members of the court-martial itself."

vided.[1] Also over classes of persons, such as idiots, lunatics, minors and insane, under laws concerning the settlement of estates and guardianship, which will be more fully referred to under other heads.

Where the jurisdiction of the court is statutory (not constitutional), the legislature may enlarge, restrict or entirely abolish the court.[2] Sometimes the jurisdictional act is such that the public is the adverse party to the proceedings. When such is the case, any person may be interested, and, even without any separate or distinct rights from other citizens, may appear and defend or contest the right claimed by the moving party.[3]

A court of general jurisdiction may have special and summary power, wholly derived from statute, not exercised according to the course of the common law, and which does not belong to it as a court of general jurisdiction; and in such cases its decisions must be treated like those of courts of limited and special jurisdiction.[4]

[1] State v. Smith, 65 N. C. 370; Perkins v. Corbin, 45 Ala. 118; Keal v. Judge, 36 Mich. 331; Bank v. Duncan, 52 Miss. 740; Goodrich v. Conrad, 24 Iowa, 254. Bunce v. Bunce, 59 Iowa, 533, holds that a clerk, when authorized by statute to keep open court and transact business in probate not requiring notice, may approve a guardian's deed for sale of minor's property.

[2] Windsor v. McVeigh, 93 U. S. 277; McVeigh v. United States, 11 Wall. 267; Ex parte Lange, 18 Wall. 163.

[3] Furgeson v. Jones, 17 Oregon, 204; 11 Am. St. 808, and note; Richardson v. Seevers, 84 Va. 259; Brown v. Barry, 3 Dall. 365; Embury v. Conner, 3 N. Y. 523; Johnson v. Von Kettler, 84 Ill. 316; Ins. Co. v. Owen, 30 Mich. 441, 442; Haywood v. Collins, 60 Ill. 333; Markham v. Howell, 33 Ga. 508; Bassick Mining Co. v. Schoolfield, 10 Colo. 46.

[4] Galpin v. Page, 18 Wall. 371, reads: "A court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it." 1 Cooley's Blackstone, 3d ed. n. 4, sec. 2. The intention of the legislature, when properly discoverable, is always to control in the construction of statutes. People v. Utica Ins. Co. 15 Johns. 358; Jackson v. Collins, 3 Cow. 89; Crocker v. Crane, 21 Wend. 211; Ellis v. Paige, 1 Pick. 45; People v. Canal Commissioners, 4 Ill. 153; Parsons v. Circuit Judge, 37 Mich. 287; State v. Nicholls, 30 La. Ann. 980; Barker v. Esty, 19 Vt. 131; Catlin v.

§ 14. Legislative powers.— Where jurisdiction is conferred on a court by the constitution, the legislature may nevertheless regulate the mode and manner of its exercise, and such legislative enactment will be obligatory unless it practically

Hull, 21 Vt. 152; Smith v. People, 47 N. Y. 330; Horton v. School Commissioners, 43 Ala. 598. But the intent is not to be guessed at, or reached on extraneous inquiries; it must be gathered from the language used to express it; and if this is clear and explicit, and susceptible of but one meaning, and there is nothing incongruous in it, a court is bound to suppose the legislature intended what the language imports, and must give effect to it. United States v. Fisher, 2 Cranch, 358; United States v. Ragsdale, Hemp. 497; United States v. Railroad Co. 91 U. S. 79; People v. Purdy, 2 Hill, 35; Newell v. People, 7 N. Y. 83; McCluskey v. Cromwell, 11 N. Y. 593; Holmes v. Carley, 31 N. Y. 289; Johnson v. Railroad Co. 49 N. Y. 455; Barstow v. Smith, Walk. Ch. 394; Bidwell v. Whitaker, 1 Mich. 469; Ingalls v. Cole, 47 Me. 530; Alexander v. Worthington, 5 Md. 476; Cantwell v. Owens, 14 Md. 215; Patterson v. Yuba Co. 12 Cal. 105; Ludlow's Heirs v. Johnson, 3 Ohio, 553; Woodbury v. Berry, 18 Ohio St. 456; In re Murphy, 23 N. J. L. 180; Douglass v. Freeholders, 38 N. J. L. 214; Ezekiel v. Dixon, 3 Ga. 146; State v. Liedtke, 9 Neb. 468; Frye v. Railroad Co. 73 Ill. 399; Railroad Co. v. Clark, 53 Mo. 214; Griffith v. Carter, 8 Kan. 565; Gains v. Gains, 2 A. K. Marsh. 190. See United States v. Magill, 1 Wash. C. C. 463; United States v. Palmer, 3 Wheat. 610; Merchants' Bank v. Cook, 4 Pick. 411; Poole v. Poole, 3 B. & P. 620; Astor v. Union Ins. Co. 7 Cow. 202. Anderson's Dictionary of Law, 970: "Every part must be construed in connection with the whole, so as to make all the parts harmonious, if possible, and give a meaning to each part. Washington Market Co. v. Hoffman, 101 U. S. 115 (1879). A thing within the intention is as much within the statute as if it were within the letter; and a thing within the letter is not within the statute if contrary to the intention of it. People v. Utica Ins. Co. 15 Johns. *381 (1818), Thompson, C. J.; approved, Ins. Co. v. Gridley, 100 U. S. 615 (1879). See, also, United States v. Moore, 95 id. 763 (1877); Harrison v. Commonwealth, 83 Ky. 171 (1885)." United States v. Hartwell, 6 Wall. 395, 396 (1867), cases, Swayne, J.; The Schooner Harriet, 1 Story, 255; United States v. Starn, 17 Fed. Rep. 437. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it. For illustrations of this principle, see People v. Ins. Co. 15 Johns. 381; Tonnele v. Hall, 4 N. Y. 140; Miller v. Dobson, 6 Ill. 572; Castner v. Walrod, 83 Ill. 171; Perry Co. v. Jefferson Co. 94 Ill. 214; Bailey v. Commonwealth, 11 Bush, 688; Durousseau v. United States, 6 Cranch, 307. Anderson's Dictionary of Law, 971: Laws in derogation of common law, and statutes conferring exclusive privileges, are also to be construed strictly, that is, by close adherence to the words. See Wright v. Nagle, 101 U. S. 796 (1879); Ruggles v. Illinois, 108 id. 531.

deprives the court of the power granted.[1] Where the constitution authorizes the legislature to establish courts of civil and criminal jurisdiction, it may do so without conferring jurisdiction in criminal and civil actions on the same court; it may create two independent tribunals, giving one civil and the other criminal jurisdiction.[2] Where, however, the constitution has conferred jurisdiction on a court over a particular class of cases, if the words amount to a limitation, it is incompetent for the legislature to confer the same power on another court or tribunal.[3] Such words, however, must be used as fairly

[1] It is said in Covell v. Treasurer, 36 Mich. 333: "The court also thinks that under the constitution it was competent to establish the superior court; the constitution, it is true, declares that 'the judicial power is vested in one supreme court, in circuit courts, in probate courts and in justices of the peace.' But it also declares that 'municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.' This is a plain reservation to the legislature of the power to carve out of the judicial power vested in other courts named such authority as would be proper to confer upon city courts, and to create such courts for its exercise." In People v. Hurst, 41 Mich. 334, it is said, in speaking of municipal courts: "We have also considered that there was no objection to giving them jurisdiction of the same kinds of cases originally triable in the circuit courts, so long as no constitutional authority of the circuit courts should be interfered with." Heath v. Kent Circuit Judge, 37 Mich. 372; Allen v. Kent Circuit Judge, id. 474. See State v. Judge, 11 La. Ann. 187. Ex parte Harker, 49 Cal. 465, holds: The fact that the constitution confers jurisdiction upon the district courts in equity cases does not prevent the legislature from prescribing the procedure by which the jurisdiction is to be exercised, unless the regulations adopted substantially impair the constitutional power of the court or practically defeat its exercise.

[2] See above cases.

[3] Spencer Creek Water Co. v. Vallejo, 48 Cal. 72, holds as follows: "Section 8, article 6, of the constitution confers upon the county courts original jurisdiction 'of all such special cases and proceedings as are not otherwise provided for.' The proceedings provided for in the statute of 1858 are to be classed as special cases. Jurisdiction of such special cases pertains to the county courts, unless the statute confers it upon some other proper tribunal. The county courts are the residuary donees of such jurisdiction. The legislature may grant jurisdiction to those courts as well as to the district courts, and in view of the decision in the appeal of Houghton (42 Cal. 35), in which it was held that the court had no appellate jurisdiction of the proceedings sought to be reviewed, because the statute had declared that the judgment of the county court should be final,— in other words, because no appeal had been provided,— it would seem to be the necessary conclusion that jurisdiction of special cases can be exercised only by those courts to which it is granted by the statute and the county court

amount to a restriction of legislative authority and prevent ordinarily the exercise of concurrent jurisdiction by another court. As the legislature is not vested with judicial power, it cannot cure the want of jurisdiction in a court by validating a void judgment by subsequent enactment.[1] When by affirmative words the statute gives jurisdiction over the subject-matter of the action, and also prescribes the manner in which the power shall be exercised, particularly if the subject-matter was a common-law remedy, the statute is held directory, not infrequently; but such construction is never placed on negative words, for they go to the power of the court itself.[2] Where,

when not otherwise provided for. The question therefore arises whether, under the constitution, the legislature has competent power to create a tribunal and confer upon it jurisdiction in special cases; for it is beyond question that the county judge is not the county court, and although the legislature may authorize the judges of the several courts to perform certain duties at chambers, in respect to proceedings in a cause, yet some court has jurisdiction of the cause, and the judge, in chambers, whether of the same or another court, acts as a commissioner or in some other capacity merely in aid of and subordinate to the court having jurisdiction of the cause. It being, we think, beyond dispute that a county judge is not the county court, if jurisdiction of special cases could be conferred upon the county judge it is equally competent to the legislature to confer it upon the county clerk, recorder or sheriff, or to create a new tribunal for the exercise of such jurisdiction."

[1] In Lane v. Nelson, 79 Pa. St. 409, the court say: "It is settled by a current of authority that the legislature cannot, by an arbitrary edict, take the property of one man and give it to another; and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead. Norman v. Heist, 5 W. & S. 171; Menges v. Dentler, 9 Casey, 495. To exercise judicial powers is not within the legitimate scope of legislative functions, and when vested rights are divested by acts of that character they will and ought to be adjudged inoperative, null and void." Pryor v. Downey, 50 Cal. 389; 19 Am. Rep. 656, holding: A statute attempting to validate a judgment void for want of jurisdiction, and sales made under it held void as an attempt by the legislature to exercise judicial power and as in contravention of the constitutional provision that no person can be deprived of his property without due process of law. See authorities cited.

[2] In Bladen v. Philadelphia, 60 Pa. St. 466, the court say: "It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory and when mandatory or imperative. Where the words are affirmative and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often

however, the power bestowed gives a right or remedy not known to the common law, the statute will be strictly construed, and the jurisdiction of the court limited to the mode pointed out by it.[1] The rule is that where the jurisdiction of the subject-matter is possible, upon proof applicable to the facts, by a fair interpretation of the statute, then the construction placed upon the statute will be in favor of the jurisdiction of the court.[2] This rule, however, applies more particularly to

have been construed to be directory; but negative words which go to the power or jurisdiction itself have never, that I am aware of, been brought within that category. 'A clause is directory,' says Taunton, J., 'when the provisions contain mere matter of direction and no more; but not so when they are followed by words of positive prohibition.' Pearse v. Morrice, 2 Ad. & El. 96. The words of the statute are: 'No debt or contract hereafter incurred or made shall be binding upon the city of Philadelphia unless authorized by law or ordinance and an appropriation sufficient to pay the same be previously made by councils.'" The plaintiff was appointed a clerk of the city and accepted the place under his appointment at the salary then fixed by them, subject to this statute. This was the contract on which he sues. By it the debt of the city he claims to recover was incurred. He alleges that there was a previous law which empowered the board to fix his salary, naming it; but, admitting that the provisions to which he refers were then in force, he does not pretend that the other member of the sentence had been complied with; that there had been an appropriation sufficient to pay the same previously made by the council. Had the statute enacted expressly that without such appropriation the contract would be void and no debt incurred, it could not, so far as the liability of the city is concerned, have been more mandatory and imperative than it is. See City v. Flanigen, 47 Pa. St. 21; City v. Johnson, id. 382.

[1] In Conrad & Ewinger v. Starr, 50 Iowa, 480, it is held as follows: "It is a familiar principle of law that where a statute gives a right and creates a liability which did not exist at common law, and at the same time provides a specific mode in which such right shall be asserted and liability ascertained, that mode and that alone must be pursued." Cole v. Muscatine, 14 Iowa, 296; Almy v. Harris, 5 Johns. 175; Smith v. Drew, 5 Mass. 514; Rust v. Low, 6 id. 100; Richardson v. Milburn, 11 Md. 340; Clark v. Brown, 18 Wend. 221; State v. McGlothlin, 61 Iowa, 314, holding that if the right existed at common law to sue then the remedy is cumulative; Macklot v. City of Davenport, 17 Iowa, 379; Lease v. Vance, 28 Iowa, 509, where the rule is applied to fences known as line fences; City of Burlington v. Gilbert, 31 Iowa, 356, 370.

[2] Stone v. Hawkins, 56 Conn. 111, holds: Courts have jurisdiction over property of non-residents by proceedings *in rem*. Where jurisdiction is possible, and has been exercised, it will be supported by every presumption. Where it was necessary the demand sued on should exceed $100, if the bill of particulars showed $65 and interest, and the whole would equal $100, although the court entered a judg-

common-law actions, rather than those created or given by statute, not originally actionable at common law; and in actions so created the jurisdiction is more strictly interpreted, for in them the remedy must be closely confined to the provisions of the statute, and the record must show that each provision has been complied with, even in a court of general jurisdiction.[1] Where a court once acquires jurisdiction of a case it is not lost by suspending action, but the court may at any time assume jurisdiction over it and act therein, set aside an order made by mistake, and proceed with the trial of the cause as though the jurisdiction had not been suspended; and a presumption of regularity will be indulged; or, in other words, the presumption will arise that the court acted regularly and in accordance with the law and rules of practice governing the proceedings.[2] This will, however, come under presumptions of jurisdiction and regularity, and be treated of hereafter.

§ 15. The boundary between executive, legislative and judicial power, and extent of judicial control.— The constitution of the nation and the constitution of each of the

ment for less, the plaintiff could show the claim did exceed $100, to support the jurisdiction.

[1] In Furgeson v. Jones, 11 Am. State Rep. 814; S. C. 17 Ore. 204, the following language is used: "In Morse v. Presby, 25 N. H. 302, to the effect that a court of general jurisdiction may have special and summary powers wholly derived from statutes not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment and as to the person to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it." After some other observations the court adds: "But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." Northcut v. Lemery, 8 Ore. 317; Tyler v. Reynolds, 53 Iowa, 146; Long v. Hewitt, 44 Iowa, 363.

[2] State v. Clark, 80 Iowa, 168; Weider v. Overton, 47 Iowa, 538; State v. Elgin, 11 Iowa, 216; Weaver v. Cooledge, 15 Iowa, 244; Doran v. Davis, 43 Iowa, 86; Otto v. Doty, 61 Iowa, 23.

respective states support three distinct departments or coordinate branches by which the affairs of government are conducted, known as the executive, legislative and judicial. The executive or administrative department conducts the affairs of the state, suggests needed legislation, sets the legislative department in motion when extraordinary necessity arises for immediate and prompt action, and has a controlling, overseeing or superintending power, in a directory sense, even over other departments. This department is divided into branches or separate heads, each of which, within its jurisdiction, has administrative and discretionary powers, requiring executive skill, judgment and ability, and the heads of these departments are chosen with reference to the duties they are expected to perform.[1]

[1] In the case of Mrs. Decatur v. Paulding, 14 Peters, 497, the court held that a *mandamus* from the circuit court of the district to the secretary of the navy would not lie to compel him to pay to the plaintiff a sum of money claimed to be due her as a pension under a resolution of congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear affirmatively, on the application, that the pension fund was ample to pay the claim; the fund, also, was under the control of the secretary and the money payable on his warrant. The court say that the duty required of the secretary by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties; that, in general, such duties, whether imposed by act of congress or by resolution, are not mere ministerial duties; that the head of the executive department of the government, in the administration of the various important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not, by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties. In Brashear v. Mason, 6 How. (U. S.) 92, the court holds: If the plaintiff could make out a valid title to pay, as an officer of the navy of the United States, a *mandamus* to the secretary of the navy would not lie to compel payment for want of jurisdiction over an executive department. The same doctrine was applied in the case of United States v. Guthrie, 17 How. 303, where a sum of money was alleged to be due to a judge of a territory for salary. The court say: "The power of the courts of the United States to command the performance of any duty, by either of the principal executive departments, or such as are incumbent on any executive officer of the government, has been strongly contested in this court; and, in so far as that power may be supposed to have been conceded, the concession has been restricted by qualifications which would seem to limit it to acts or pro-

The legislative department is selected for the purpose of prescribing a just code of laws, creating necessary statutes, amending laws already in force, repealing unwholesome provisions that experience has found vicious or inexpedient, providing by enactments necessary and requisite in their character for emergencies that may arise, framing a plan of government with suitable laws for conducting the several other departments, making provision for supplies, directing a suitable plan of action; in short, prescribing just rules for the governed. In this respect the other departments become subservient to the direction of this department, but such direction applies only to future acts and does not affect vested rights.[1]

The judicial department is formed for the purpose of interpreting the laws and holding them within the limits fixed by fundamental or constitutional rules, restricting encroachments of one department upon the rights and duties of another as directed by the limitations laid down in defining their respective jurisdictions, directing the fulfillment of the laws, and ordering their enforcement in cases of individual violations, directing punishments by judicial order, restraining violations of law, determining individual rights, and passing on the limits of power and defining the boundaries between the several

ceedings by the officer not implied in the several and inherent functions or duties incident to his office — acts of a character rather extraneous, and required of the individual rather than of the functionary."

[1] In United States v. Ortega, 11 Wheat. 469, where a person assaulted a public minister, on indictment under the crimes act of 1790, chapter 9, section 28, for infracting the law of nations by offering violence to the person of a foreign minister, held, it was not a case affecting a public minister within the plain meaning of the constitution. "It is that of a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States and the individual whom they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern either in the event of the prosecution or in the costs attending it." Blyew v. United States, 13 Wall. 594, holds that the fact that a person is injured by a criminal act who is protected by the constitution does not come within the words of the act. See, also, Ames v. Kansas, 111 U. S. 467; Bors v. Preston, 111 U. S. 258.

other co-ordinate branches of the government; in brief, imperatively directing the fulfillment of the law, prohibiting its violation and determining the rights of parties under it.[1] If the legislature exceeds its jurisdiction the courts correct the error; if the executive steps outside of its powers the courts determine their true extent; but while either department acts within its jurisdictional limits it is independent. Therefore, while these co-ordinate branches of the government are acting within their respective fields, no other power or branch can interfere with their method of acting, or direct the manner of performing their respective duties; and hence all acts, either executive or administrative, legislative or judicial, belonging to the several departments, are independent of the control of the other branches. Where the duty to be performed embraces administrative, legislative or judicial discretion, it is a prerogative right that the courts cannot control, and this rule applies to and is inherent in every member or head of each separate department.[2]

[1] When a discretion is given to any branch of the government no other branch is authorized to interfere. March v. State, 44 Tex. 64. Where the governor has power to remove an officer for cause, the exercise of that power cannot be inquired into by the courts. State ex rel. v. Cahen, 28 La. Ann. 645; Ex parte Echols, 39 Ala. 700. A court cannot take upon itself the prerogative of compelling the promulgation of a law where it has been neglected by the legislative or executive department. State v. Deslonde, 27 La. Ann. 71. In Cragin v. Powell, 128 U. S. 698, the court say: "That the power to make and correct surveys of the public lands belongs to the political department of the government; and that, whilst the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient." Steel v. Smelting Co. 106 U. S. 447; United States v. San Jacinto Tin Co. 10 Sawyer, 639, affirmed in 125 U. S. 273; United States v. Throckmorton, 98 U. S. 61; Henshaw v. Bissell, 18 Wall. 255; Stanford v. Taylor, 18 How. 409; Niswanger v. Saunders, 1 Wall. 424; Snyder v. Sickles, 98 U. S. 203; Frasher v. O'Connor, 115 U. S. 102; Gazzam v. Phillips, 20 How. 372. See above cases under n. 1, p. 40 and n. 1, p. 41.

[2] In Sansom v. Mercer, 68 Tex. 492, it is observed by the court: "It is well settled that, if the duty an officer is called upon to perform requires the exercise of an act of judgment on his part, his decision is not subject to be revised by a proceeding for a

§ 16. Court cannot control legislative branch.—Nor does it matter that the act be ministerial, where it is omitted, provided it be discretionary; *mandamus* will not lie compelling the performance of a discretionary act, even where its performance appears to be in the nature of a duty enjoined by law; hence it has been held that the speaker of the house of representatives cannot be compelled to send a bill passed by the house to the senate, or controlled in his acts, because he belongs to a separate department, and the power to discipline is in the body of which he is a member and over which he presides, he being engaged in the performance of official acts in that department.[1] But if the act done or omitted be not a discretionary one, and is not administrative in its character,

writ of *mandamus*. Ewing v. Cohen, 63 Tex. 483; Bledsoe v. International R. R. Co. 40 id. 554; Arberry v. Beavers, 6 id. 457; 55 Am. Dec. 791; Com'rs v. Smith, 5 Tex. 471; Cullen v. Latimer, 4 Tex. 329. And it is apparent that, in a proceeding to procure an order for an election under the statute before cited, the mayor is required to determine two facts in order to justify him in making the order for the election: 1. That there is a surplus of territory over the limit prescribed by the statute; and 2. That at least fifty qualified voters of that territory have signed the petition. If there be any controversy as to the existence of these facts, his function is discretionary, and he cannot be compelled to order the election. But taking the facts of the petition to be true, as the demurrer admits, the surplus territory exists, and more than the requisite number of voters have signed the application. In such a case the discretion of the mayor ceases. The act to be done is purely ministerial. His duty becomes absolute and he can be compelled to perform it." See High on Extraordinary Legal Remedies, secs. 449 *et seq.;* State v. Kirke, 95 Am. Dec. 314; S. C. 12 Fla. 278; Miles v. Bradford, 85 Am. Dec. 643; S. C. 22 Md. 170. *Mandamus* will lie to compel performance of ministerial acts. Pacific R. R. v. Governor, 66 Am. Dec. 673, note 687; S. C. 22 Mo. 353; Mott v. Pennsylvania R. R. Co. 72 Am. Dec. 664; S. C. 30 Pa. St. 9.

[1] See United States v. Guthrie, *supra;* Decatur v. Paulding, 14 Pet. 514; United States ex rel. Dunlap v. Black, 128 U. S. 48. In this last case the court say: "The court will not interfere by *mandamus* with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute or otherwise, a mere ministerial duty is imposed upon them, that is a service which they are bound to perform without further question; then, if they refuse, a *mandamus* may be issued to compel them." See Georgia v. Stanton, 6 Wall. 50; Gaines v. Thompson, 7 Wall. 347; United States v. Schurz, 102 U. S. 378; Butterworth v. Hoe, 112 U. S. 50.

but purely ministerial, the law directing the performance and prescribing the manner in which it is to be done, although it be an official one, then a *mandamus* will lie directing and enforcing obedience by the officer.[1] The enforcement then rests against the individual; for while the act is an official one its performance is mandatory and neither discretionary nor administrative.

§ 17. Power of courts over executive department.—Courts have no power to compel the executive department to enforce the collection of public revenue, or prevent its so doing; or to dictate the kind, sufficiency or character of evidence necessary under an enabling statute to authorize administrative action. They have no control over national boundaries, for it is a purely political question, nor power to give force to a law that is not constitutional, nor to pass upon the justness or policy of a statute that is within legislative jurisdiction — in a word, they have no power to interfere with the actions or policy of any other department of government.[2]

[1] Kendall v. United States, 12 Pet. 524, was as follows: Stockton & Stokes, as contractors for carrying the mails, had certain claims against the government for extra services, which they insisted should be credited to their accounts, and a controversy arose between them and the post-office department upon the subject. Congress passed an act for their relief, by which the solicitor of the treasury was authorized and directed to settle and adjust their claims, and make them such allowances as upon a full examination of all the evidence might seem equitable and right; and the postmaster-general was directed to credit them with whatever sums the solicitor should decide to be due them. The solicitor, after due investigation, made his report and stated the sums due to Stockton & Stokes on the claims made by them: but the postmaster-general, Mr. Kendall, refused to credit them as directed by law. This the court held he could be compelled to do by *mandamus*, because it was a simple ministerial duty to be performed and not an official act requiring the exercise of any judgment or discretion. See United States v. Black, 128 U. S. 45–6; State ex rel. v. Hays et al., Com'rs, 50 Mo. 36.

[2] United States v. Arredondo, 6 Pet. 711: "This court did not deem the settlement of boundaries a judicial but a political question — that it was not its duty to lead but to follow the action of the other departments of the government; that when individual rights depended on national boundaries the judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established." In Belcher et al. v. Linn, 24 How. 522, the court say: "We hold that when

§ 18. Power over executive and legislative officers — Waiver.— The jurisdiction given to the executive or administrative and the legislative departments of the government by the organic law of the state or constitution is a prerogative belonging to the office and not subject to delegation by the incumbent of the office; it belongs to the office only, and the officer cannot by consent delegate the right to the court to declare the law on a matter that belongs to him to construe, not even by a waiver, nor by joining with the relator in asking the court to exercise its jurisdiction. An executive officer cannot surrender the defenses which, not for his benefit but for the public good, the law has placed around the office he fills. His assent cannot authorize the court to transgress its powers and assume a jurisdiction the fundamental law of the land has forbidden it to exercise.[1] But there are some matters that are jurisdictional which may be waived. As an instance of waiver we refer to a case where, on appeal from a court having no jurisdiction of the subject-matter to a court of general jurisdiction, the defendant by going to trial without objection was held bound by the judgment; and the rule may be laid down that if a party entitled to complain of the want of jurisdiction for any cause neglects to do so, and takes subsequent steps in a court having jurisdiction inconsistent with an intent to take advantage of the want of power below and permits a judgment on the merits to be rendered,[2] he is bound thereby.

power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are in general binding and valid as to the subject-matter. The only questions which can arise between an individual and the public, or any person, denying their validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial or special, unless an appeal or other revision is provided for."

[1] See Rankin v. Hoyt, 4 How. 327; Stairs v. Peaslee, 18 How. 524; County Treasurer v. Dike, 20 Minn. 363; Rice v. Austin, 19 Minn. 103; Dennett, Petitioner, 32 Maine, 508; In the Matter of the Application of the Senate, 10 Minn. 78. See, however, People v. Bissell, 19 Ill. 229; People v. Matteson, 17 Ill. 167; and Pacific R. R. v. Governor, 23 Mo. 355. The writer insists that, so far as these last three authorities seem to hold that the court can act by assent of the officer, they were not well considered.

[2] Baker v. Kerr, 13 Iowa, 384. In this case there was no service of notice on the defendant, but the case was appealed for error on other grounds and cause remanded. *Held*, the want of jurisdiction over the de-

§ 18a. Waiver continued.—It may be laid down as a rule of law that where the question of jurisdiction becomes one of fact in the trial of the cause, wherein it has to be determined where an offense was committed, or whether the act done amounted in law to a criminal offense, triable on indictment or information, or whether the act to be established had been established by the evidence, then the remedy is by appeal,

fendant was waived. A strong instance of waiver is where, on appeal from a court having no jurisdiction of the subject-matter to a court having general jurisdiction, the parties going to trial without objection, are held bound by the judgment. Randolph Co. v. Ralls, 18 Ill. 29; Shirk v. Trainer, 20 Ill. 302; Danforth v. Thompson, 34 Iowa, 243. On this subject see Wilcox v. Kassick, 2 Mich. 165, where the question is discussed at some length. The leading case on the subject is Brittain v. Kinnaird, 1 Brod. & B. 437: Conviction under the bumboat act. The record was fair on its face, but it was insisted that the vessel in question was not a "boat" within the intent of the act. Dallas, Ch. J.: "The general principle applicable to cases of this description is perfectly clear; it is established by all the ancient and recognized by all the modern decisions, and the principle is that a conviction by a magistrate who has jurisdiction over the subject-matter is, if not defective on its face, conclusive evidence of the facts stated in it. If the subject-matter in the present case were a boat, it is agreed that the boat would be forfeited; and the conviction stated it to be a boat. But it is said that, in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat, and that it is competent to the party to impeach the conviction by showing that this was not a boat. I agree that if he had not jurisdiction the conviction signifies nothing. Now, allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from vessel, still, it was matter of fact to be made out before the magistrate, and on which he was to draw his own conclusions. But it is said that a jurisdiction limited as to person, place and subject-matter is stinted in its nature, and cannot be lawfully exceeded. I agree; but upon the inquiry before the magistrate, does not the person form a question to be decided by evidence? Does not the place, does not the subject-matter, form such a question? The possession of a boat with gunpowder on board is part of the offense charged; and how could the magistrate decide but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and when he has inquired, his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat." Richardson, J., said, in concurring, "Whether the vessel in question were a boat or not was a fact on which the magistrate was to decide; and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction."

and the question is not jurisdictional. So also where some personal privilege belongs to the defendant in a case, or some matter that he must plead or raise by motion or demurrer in order to bring it before the court and show the want of jurisdiction, then the defendant waives it by not raising the question. Therefore, where citizenship of the plaintiff in one state and of the defendant in another is not raised, and the party goes to trial in a federal court, and appeals the cause on other grounds, and the case is decided on its merits, the question of jurisdiction is waived.[1] But if the court had no jurisdiction over the subject-matter or power to render the judgment it gave in any event, then the judgment is void.

Laches is not a waiver, nor failure to appear; but if by consent the court had jurisdiction of a sum larger than one hundred dollars, the party, by appearing and consenting to go to trial on the issue as made, is presumed *prima facie* to have assented, and cannot object to the judgment to the limit of the power given.[2]

[1] In Sheldon v. Wright, 5 N. Y. 511, the court say: "A surrogate holds a court of limited jurisdiction, and the same rule is applicable to a surrogate's court as to other inferior courts. That rule is that there should always appear sufficient on the face of the proceedings of an inferior court to show that it had jurisdiction of the cause or subject of which it takes cognizance. The facts on which its jurisdiction depends must be averred and appear on the record. The statute conferring jurisdiction on the surrogate does not require preliminary proof to be made to him of the facts on which his jurisdiction depends, as does the statute giving jurisdiction to a commissioner in the case of an absconding, concealed and non-resident debtor. . . . Among the directions are these: He shall not grant administration until he has satisfactory proof that the person of whose estate administration is claimed is dead, and died intestate. . . . Intestacy has not only no connection with the question of jurisdiction, but must always be a subject of investigation before the surrogate. . . . Surely the jurisdiction cannot rest on the result of such contest."

[2] Sec. 18, n. 2, p. 45. In Schlisman, Assignee, v. Webber et al. 65 Iowa, 117, the court say: "Under section 3669, the proceedings of courts of limited jurisdiction are presumed to be regular, except in regard to matters required to be made of record; and, as the consent of the parties to the jurisdiction is not required to be made a matter of record, the presumption is that such consent was communicated to the justice in some manner before he proceeded to take jurisdiction of the case."

CHAPTER III.

JURISDICTION OF COURTS IN GENERAL.

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§ 19. Courts — Definition of. — A court is a tribunal, organized pursuant to the law of the sovereignty or government creating it, for the administration of justice, with defined powers for hearing, determining and deciding causes of action be-

tween individuals or other parties, when lawfully brought before it, of such nature as the law has authorized it to hear, decide and determine. It has generally the power to enforce its orders and judgments by and through the executive officers provided for by law for that purpose, and to preserve order during its sessions. It also, where that power is given it, preserves the peace of the state and enforces the criminal laws by punishing the offender when properly charged with crime. Its orders are mandatory; but it can only speak through its record after the parties to the controversy have had a full opportunity to be heard.[1]

Courts are of three kinds; those of original jurisdiction, being known as courts of record, having a clerk and seal, and sheriff or marshal to attend them, and to enforce their judgments, orders and decrees; also jurors to aid in determining questions of fact.

Blackstone, in his commentaries, defines a court as follows: "The more effectually to accomplish the redress for private injuries, courts of justice are instituted to protect the weak from the insults of the strong, by expounding and enforcing those laws by which rights are defined and wrongs prohibited. In every court there must be an actor, plaintiff, who complains of an injury, a *reus*, defendant, who is called upon to make satisfaction; and a *judex*, having official power to examine the truth of the facts, determine the law arising thereon, and, for injuries done by its officers, to apply the remedy."

A court of general jurisdiction is one that takes cognizance of all causes, civil or criminal, of a particular nature, defined and provided by law. Absolute, original, general jurisdiction over all subjects out of which an action or prosecution may arise is not given to one court.

[1] Matters of record are proven by certified copies or the record itself. Goodrich v. Conrad, 24 Iowa, 256. Shurbun v. Hooper, 40 Mich. 505: A court is defined as a permanent organization for the administration of justice; not a special tribunal provided for by law, occasionally called into existence and ceasing to exist with particular exigencies. Gold v. Vt. Cent. R. Co. 19 Vt. 482, defines a court: The term "court" may mean the "judge" or "judges" of the court, or the judge and the jury, according to the connection, and the object of its use. See Anderson's Dictionary of Law, 274.

Some actions are of trivial importance, either as to amount, or because of their common character or their frequency of occurrence, and are given to smaller tribunals to determine. Such courts are defined as inferior courts.

A court may possess original jurisdiction of one class of actions and appellate jurisdiction of other classes; but the same court cannot possess both original and appellate jurisdiction over the same class of actions; that is, the same court cannot possess original and appellate jurisdiction at the same time in the same action; but an action in which a court may have original jurisdiction may be commenced originally in an inferior court and the court may take appellate jurisdiction by and through such inferior court. The judges of a court may possess original jurisdiction of an action and try and determine a cause, and the several judges holding *nisi prius* courts may, combined, constitute a court of appellate jurisdiction. The several justices of the supreme court of the United States constitute the judge or one of the judges of the United States circuit court; and this is true of many of the judges of the supreme courts in several of the states.

An appellate court is a court that does not have original jurisdiction, but reviews the acts of some subordinate court on appeal or by writ of error, and there affirms, reverses or modifies the order, judgment or decree of the inferior court, or rather the court of original jurisdiction.[1]

§ 20. Limited jurisdiction defined.— A court of limited jurisdiction is not necessarily a court of inferior jurisdiction; but the words "limited jurisdiction" have sometimes improperly been applied to courts of original jurisdiction generally. While, as a general rule, an appeal lies in most actions to an appellate court for the review of the action tried in the court of original jurisdiction — because, not infrequently, error will creep in at the trial of nearly all *nisi prius* cases — the primary trial court should not, on that account, be regarded as a court of limited jurisdiction. A court may have jurisdiction only over a single class of actions, as a probate court, a court for the trial of impeachments; the supreme court of the United States has been given by the constitution original

[1] Constitution of the U. S. art. 3, sec. 1.

jurisdiction in a certain class of actions.[1] Where the jurisdiction of a court is general over any class of actions, it cannot be regarded as having only inferior jurisdiction.[2] Therefore the rule is that, where a court is given complete or general jurisdiction over any class of actions, if it be a court of record, it is not a court of inferior jurisdiction, although its jurisdiction is limited; and within the sphere of its power the same presumptions attach as though its jurisdiction was general.

An inferior court, as we shall see, is a court whose jurisdiction is limited by the amount in controversy, and that does not have a clerk or seal; but even as to such, when it appears that jurisdiction has attached, the same presumption exists in favor of the exercise of its powers, and its judgments are as conclusive and entitled to the same credibility as those of the highest courts.

[1] Constitution of the U. S. art. 3, sec. 2.

[2] In Pursley v. Hayes, 22 Iowa, 33, Wright, C. J., says: "The county court is, we admit, a court of limited and inferior jurisdiction. However, like a court of general jurisdiction, every intendment will be indulged in favor of its acts, when acting within the scope of its power. That is to say, if jurisdiction has once attached, then the presumption obtains in favor of all the subsequent proceedings; and mere irregularities or defects will not avail collaterally. Thus, as to a defect in a petition, if it relates to a proper subject-matter so as to invoke legitimately the action, or jurisdiction of the court, its sufficiency in a collateral proceeding cannot be called in question. The right to decide is one thing, and the decision itself quite another. For the right to decide arises only when there is jurisdiction; and unless it exists, no right can follow from it. But, the right existing, error of decision may be corrected; but it cannot reach forward and affect those who have in good faith relied upon its correctness. Perrine v. Farr, 2 Zab. 356. Thus, the power to decide being shown, this power is not lost or taken away because it may be improperly exercised; and hence, if the parties are properly in court, that these names are ordered to be inserted in a petition already filed, instead of filing a new petition; that there was a defective bond, either in amount or formal conditions, received and accepted as good, however, by the court; that there may have been error in the conclusion reached upon the facts shown,—all these and similar matters must be accepted as absolutely conclusive in a collateral proceeding; and this whether the court is one of limited and inferior or general and superior jurisdiction." Brown v. Wood, 17 Mass. 68; Grignon's Lessee v. Astor, 2 How. 319; Lampson v. Platt, 1 Iowa, 556; Thompson v. Tolmie, 2 Pet. 157; Morrow v. Weed, 4 Iowa, 77; Perkins v. Fairfield, 11 Mass. 227; Elliott v. Peirsol, 1 Pet. 328, where the court say: That when a court has jurisdiction, it has a right to decide every question that arises in a case;

§ 20a. Limited, inferior and superior courts — Distinctions between.— The law books are filled with the sayings of judges in speaking of courts and the presumptions that arise in favor of their actions or against their jurisdiction, referring to them as courts or as a court of "general jurisdiction," "superior jurisdiction," "inferior jurisdiction" and "limited jurisdiction;" but if a court be a court of general common-law jurisdiction the presumption arises that, because of its acquaintance with the forms of the law and the rules of practice governing it, it acted in accordance with such rules and did not act until every prerequisite prescribed by the law had been complied with, unless the contrary appears from the face of the record. This presumption arises, first, because of the general powers and jurisdiction over many actions or classes of actions that exist, and the presumption attaches to it that it possessed jurisdiction over the subject-matter and acted under the rules of law after the parties had all been properly brought before it. The presumption further arises in favor of such court that its powers had been properly invoked by a suitable petition or complaint laid before it, setting forth the cause of action; that its process had been properly served on the defendant, and that the subject-matter was one it had authority to try.[1]

and whether its decision be correct or not, its judgment, until reversed, is regarded as binding on every other court. McPherson v. Cauliff, 11 S. & R. 427; Bangs v. Duckinfield, 18 N. Y. 592; Knowles v. City of Muscatine, 20 Iowa, 248. In Agricultural Ins. Co. v. Barnard, 96 N. Y. 531, the court say: "The filing of a petition which shows the existence of a valid outstanding debt of the lunatic, requiring the disposition of his property to enable the committee to pay, vests the court with jurisdiction of the subject-matter under the act, and such jurisdiction would not be divested by subsequent irregularities in the proceeding unless they were taken in direct violation of some express provision of the statute." Fisher v. Hepburn, 48 N. Y. 50; Mohr v. Manierre, 101 U. S. 418.

[1] In Gosset v. Howard, 10 Q. B. 453, the court say: "Nothing shall be intended to be out of the jurisdiction of a superior court but that which appears to be so." Guilford v. Love, 49 Tex. 715; Goar v. Maranda, 57 Ind. 339. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. Withers v. Patterson, 27 Tex. 491; Holmes v. Campbell, 12 Minn. 221; Spaulding v. Baldwin, 31

On the other hand, a court having limited jurisdiction is not indulged with such presumption of regularity, and the law requires that it appear from the record and proof that the subject-matter of the action had before the court was within its judicial powers; that due service of its process had been made upon the defendant within its jurisdiction, and a full record of its proceedings should be set forth. Where the proceedings before such court are *in rem*, it must appear that the court had jurisdiction over the subject-matter, that the property was brought before it and was under its control, and that the proper statutory notice or warning had been given to the owner, defendant, giving the court the right to act as it did act. In respect to these matters the jurisdictional facts must all appear from the face of the record or be shown *aliunde* to sustain the judgment. When these facts do appear, then every presumption exists in favor of such court, and its judgments are presumed to be correct.[1]

Ind. 376; Butcher v. Bank, etc. 2 Kan. 70; Reynolds v. Stansbury, 20 Ohio, 344; Bush v. Lindsey, 24 Ga. 245; Hahn v. Kelly, 34 Cal. 391; Cox v. Thomas, 9 Gratt. 323; Wells v. Waterhouse, 22 Me. 131; Ely v. Tallman, 14 Wis. 28; Potter v. Merchants' Bank, 28 N. Y. 656; Arnold v. Nye, 23 Mich. 286; Smith v. Pomeroy, 2 Dillon, C. C. 414; Foot v. Stevens, 17 Wend. 483.

[1] Grignon's Lessee v. Astor, 2 How. (U. S.) 319. Mr. Freeman, in his valuable work on Judgments, lays down the rule in substance as follows, in speaking of courts not of record: "The chief distinction between judgments pronounced by courts of record and those pronounced by courts not of record arises from the presumption of law that the former courts act within their jurisdiction, while, so far as jurisdiction is concerned, no presumption is indulged in favor of the latter. Whoever relies upon the judgment of a court of special jurisdiction must establish every fact necessary to confer jurisdiction upon the court. The proceedings of all courts, not of record, must be shown to be within the powers granted to them by law, or such proceedings will be entirely disregarded." Sec. 517. See Sears v. Terry, 26 Conn. 273; Shufeldt v. Buckley, 45 Ill. 223; Taylor v. Bruscup, 27 Md. 219; Thompson v. Multnomah Co. 2 Ore. 34. But being shown to be within the powers granted, and the jurisdiction appearing, then the conclusiveness of the judgment is as effective and binding, even although it was erroneous, as though the judgment had been rendered by a court of record. Bell v. Raymond, 18 Conn. 100; Shoemaker v. Brown, 10 Kan. 383; Bernal v. Lynch, 36 Cal. 135; Sheldon v. Wright, 5 N. Y. 497; Reid v. Spoon, 66 N. C. 415; Comstock v. Crawford, 3 Wall. 396; Traer v. Whitman, 56 Iowa, 443; Moore v. Jeffers, 53 Iowa, 202; Cent. Iowa R'y Co. v. Piersol, 65 Iowa, 498.

The law frequently gives jurisdiction upon the existence of a certain fact; in such case the existence of it is necessarily a jurisdictional question; as an illustration, a probate court only acquires jurisdiction over an estate upon the death of the owner. The death of the person whose estate is to be probated is a jurisdictional fact, and the court acquires no jurisdiction, whatever may be the facts presented or finding made, unless the person whose estate is being acted upon is actually deceased.[1] In such case the fact of death need not appear of record, but it must exist.

A justice of the peace has limited common-law jurisdiction and he is by law a conservator of the peace, and a presumption attaches that he has common-law jurisdiction over such small matters as may be intrusted to him; but it generally should appear that he has jurisdiction over the subject-matter; and, as a rule, his record should show, and the record of all courts of inferior jurisdiction should show, jurisdiction over the subject-matter, and that the party defendant was properly served with notice or process within the jurisdiction of the court.[2] These presumptions of jurisdiction may be either supported or overcome by proof *aliunde*.[3] A justice of the peace has limited jurisdiction in amount or value; his jurisdiction is limited as to territory, seldom extending in any case beyond his county, and often restricted to the township in which he resides; his record must show the manner in which his process was served, the place of service, and such other jurisdictional facts as called forth the exercise of his judicial power. These things appearing of record, *prima facie* the presumption of jurisdiction arises.[4]

[1] See *post*, n. 1, p. 58, and *ante*, § 18, n. 2, p. 45.

[2] *Post*, § 22, p. 65, n. 2.

[3] It was presumed at common law that justices of the peace proceeded lawfully and had acquired jurisdiction over the defendant until the contrary appeared. Hendrick v. Whittemore, 105 Mass. 28; Rex v. Clayton, 3 East, 58; Billings v. Russell, 23 Pa. St. 191; Farr v. Ladd, 37 Vt. 158; Lightsey v. Harris, 20 Ala. 411. And in Barber v. Kennedy, 18 Minn. 216, the court hold that a judgment rendered by a justice of the peace is not void because he failed to file the complaint. Morrow v. Weed, 4 Iowa, 77; Ryan v. Varga, 37 Iowa, 78. This last case will be referred to again. Hodge v. Ruggles, 36 Iowa, 42.

[4] It has been held in California, where the question was directly involved and decided, that any fact essential to jurisdiction may be shown by evidence *aliunde* (Jolley v. Foltz, 34 Cal. 321); and this view seems to

§ 20b. What facts must appear on the face of the record to show jurisdiction in an inferior court.— To establish jurisdiction the record of an inferior court must show that the subject-matter was of a nature that the court had power to try; that the party defendant was properly served with process; that the cause of action was one that was properly triable before the court at the place where it was held, and that service of process was made within its jurisdiction in the proper manner.

It would not be sufficient to give jurisdiction for the record to show that the process "was duly served," for that would be a conclusion of law, adding nothing to the effect of the officer's return; or for the court to find it had jurisdiction when it had not; but the record should show that the proper process was issued, the proper return of service was made, the nature of the action, that the proper invocation of jurisdiction was made, as a sufficient information in a criminal case showing that an offense that the court had power to try had been committed, and charging the defendant with the commission thereof. The record must show that process was issued, that service was made, giving the time, place and manner of service, the time of return, the time the court convened, and that the trial was called in the manner and at the time appointed; if the parties voluntarily appeared, that should be shown, or any fact showing waiver.[1]

be the present law in this country. Van Deusen v. Sweet, 51 N. Y. 381; Schlisman v. Webber, 65 Iowa, 114; Hamilton v. Millhouse, 46 Iowa, 74. See note 2, this section. Judgments of justice of the peace courts are void unless all the jurisdictional requirements of the statute have been complied with. Penrose v. McKinzie, 116 Ind. 35; Leathers v. Morris, 101 N. C. 184; Railway Co. v. Ryan, 31 West Va. 364.

[1] In Lowe v. Alexander, 15 Cal. 296, it is held that a record showing that a "summons was duly served" is a mere conclusion of law. So also a return signed "E. C., deputy sheriff," as the law does not recognize the act of a deputy sheriff except for and in the name of his principal. Rowley v. Howard, 23 Cal. 401. See Mallett v. Uncle Sam Co. 1 Nev. 188; Gallatian v. Cunningham, 8 Cow. 361, *contra*. Voluntary appearance will not confer jurisdiction where the defendant is a resident of another county. McMeans v. Cameron, 51 Iowa, 691; Boyer v. Moore, 42 Iowa, 544. A notice in which the return day is left blank is of no validity. Phinney v. Donahue, 67 Iowa, 192. But the fact that the justice rendered judgment before the return hour of process, the time mentioned in the citation, does not destroy jurisdiction. McNeill v. Hallmark, 28 Tex. 157; Gowing v.

There are, of course, some cases where the court is, before the process is issued, and as a preliminary matter, required to find jurisdictional facts; when these are found the presumption of jurisdiction is conclusive.[1]

§ 21. Two classes of appeals — Definition of.— We have already shown that an appellate court is created to review the decisions of courts of original jurisdiction, to the end that the law shall be uniformly administered throughout the state. There are, however, two classes of appeals. An appeal proper is one where at law the case is retried upon both the questions of law and fact, and this is the universal rule in strictly equity and admiralty cases; the entire case, as to law and fact, is retried on appeal in all cases where an appeal proper is taken. Actions at law are, however, usually reviewed by writ of error or upon a writ of *certiorari* in the appellate court. In such appeal the question of fact that usually has been tried before a jury in the court below is not critically examined unless there is an entire want of evidence to sustain the judgment of the trial court. While the court may consider the facts for the purpose of determining whether the evidence is sufficient to warrant the judgment, or any judg-

Gowgill, 12 Iowa, 497; Hetfield v. Towsley, 3 Greene (Iowa), 584.

[1] In Ryan v. Varga, 87 Iowa, 80, the court held: "But if, in fact, the petition was not signed by one-third of the resident tax-payers of the township, nevertheless we hold that after the trustees have decided that it was signed by the required one-third and have ordered the election which has been held, the aid voted and tax levied pursuant to it, the validity of such tax cannot be assailed on the ground that the petition was not signed by the requisite number of tax-payers. That fact can be re-examined and again decided only upon an appeal, writ of error, *certiorari* or other method provided for a direct review of the decision made by the trustees. The decision of that question by the trustees is judicial; and since the statute gives them express and undoubted jurisdiction to determine it, their judgment becomes, like every other judicial determination, conclusive until reversed or set aside by direct proceedings in the manner provided by law. It cannot be assailed indirectly or collaterally, as is sought to be done in this case." Com'rs of Knox County v. Aspinwall, 21 How. 539; Evansville, etc. Co. v. The City of Evansville, 15 Ind. 395; Koehler & Lange v. Hill, 60 Iowa, 566; Martin v. Mott, 12 Wheat. 19. But where the record shows a statement in contradiction of the fact found, then the presumption is changed. As where the trustees find the petition was signed by half of the tax-payers when it should be signed by a majority; they have no jurisdiction in such a case. Slack v. Blackburn, 64 Iowa, 375.

ment at all, for the purpose of ascertaining whether the court below erred in granting or refusing a new trial or in taking the cause from the jury, it will not review the finding of facts made in the court below when the court or jury had sufficient evidence to warrant such finding.[1] But a court cannot deny an appeal proper in a chancery case so that the appellate court may not fully review the cause on appeal, and at the same time deny the right of trial by jury on the questions of fact; and a statute providing such a rule has been held unconstitutional.[2]

§ 22. Courts of record.— A court of record, in a sense, is a court possessing some common-law jurisdiction, but not necessarily of all common-law actions, that has a judge, appointed terms, a clerk and a seal, having attributes and exercising functions independently of the person of the magistrate desig-

[1] The remedy known in England is in a great measure confined to causes in equity, ecclesiastical and admiralty jurisdiction, as to each of which no jury intervenes. In courts proceeding according to the civil law an appeal removes the whole of the proceedings, and usually, although not invariably, opens the facts as well as the law for re-examination. Wiscart v. Dauchy, 3 Dall. 327; United States v. Goodwin, 7 Cranch, 110; Brewster v. Wakefield, 22 How. 128, where the court say: "But the case presented by the record is not a case at law, according to the meaning of those words in courts which recognize the distinction between law and equity. On the contrary, it is a proceeding in the nature of a bill in equity to foreclose a mortgage, in which the facts as well as the law are to be decided by the court; and an appeal, and not a writ of error, was the appropriate mode of bringing the case before this court." As to review of facts in actions at law, see 22 Am. Law Review, 262–268. City of Minneapolis v. Wilkin, 30 Minn. 144. See Ex parte McCardle, 7 Wall. 506; Osborn v. Bank of United States, 9 Wheat. 738; Buel v. Van Ness, 8 Wheat. 312; Williams v. Norris, 12 Wheat. 117; Montgomery v. Hernandez, 12 Wheat. 129; Weston v. City Council of Charleston, 2 Peters, 449.

[2] In Sherwood v. Sherwood, 44 Iowa, 192, the court say: Under our constitution the supreme court has appellate jurisdiction only in chancery cases. It may not try such cases upon errors of law. By article 1, section 9, also, it is declared that "the right of trial by jury shall remain inviolate." The right of trial by jury, therefore, exists in actions at law, and the right of trial on appeal exists in all chancery cases. A party may not, therefore, be denied a trial by jury because the action is in chancery, and then be denied a right of trial as upon appeal because the action is one at law. Every party has, under our constitution, a right either to a jury trial in a court below or a trial as upon appeal in the supreme court. On rehearing of this case Beck, justice, announcing the opinion, said: "This court has appellate jurisdiction only in cases in chancery, and is a court for the correction of errors in actions at law. Const. art. 5, § 4.

nated to preside over it.[1] In the United States statute for the naturalization of aliens it is provided that an alien may be naturalized by any court of record of any state or territory having common-law jurisdiction, and a seal and clerk; yet it has been held that a court having a clerk and seal, and the common-law jurisdiction of a justice of the peace, is a court of record.[2] The word court includes the judge, clerk, jury, attorneys, etc., in a general sense, when applied to a court of record; in the sense of a court it must include the judge as presiding officer, a clerk, appointed term, and time of holding of the court as fixed by law.[3] To constitute a court of superior

Its jurisdiction being thus prescribed, it cannot exercise powers in one class of cases which are limited to the other. The distinction between the powers to be exercised in the different cases is pointed out in the foregoing opinion, and will be readily understood by the profession."

[1] A court of record is an organized judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. See Ex parte Gladhill, 8 Met. 170; Davis v. Hudson, 29 Minn. 35; Freeman on Judgm. sec. 122; Peacock v. Bell, 1 Saund. 74. Courts of record having authority over the subject-matter are competent to decide upon their own jurisdiction, and to exercise it to final judgment without setting forth upon the records the facts and evidence upon which their decision is based. Their records are absolute verities, not to be impugned by averment and proof to the contrary. Grignon's Lessee v. Astor, 2 How. (U. S.) 319; Rex v. Carlile, 2 B. & Ad. 367; *ante*, § 20*a*.

[2] The naturalization law provides that any court of record having common-law jurisdiction, a seal and clerk can exercise the power. McCrary on Elections, sec. 54. The act of congress does not require that the court shall have common-law jurisdiction which pertains to all classes of actions. It is sufficient that it has common-law jurisdiction. In the Matter of Martin Conner, 39 Cal. 98; Morgan v. Dudley, 18 B. Mon. (Ky.) 693. In Ex parte Gladhill, 8 Met. (Mass.) 168, Chief Justice Shaw held: The police court of Lowell, being vested with all the civil and criminal jurisdiction of a justice of the peace, was a court of common-law jurisdiction within the meaning of the act of congress, and had power to naturalize aliens and admit them to citizenship, the court having power to appoint a clerk in its discretion and adopt a seal as it desired. See, also, People ex rel. Brackett v. McGowan, 77 Ill. 644; Ex parte Buckhardt, 16 Tex. 470; Dale v. Irwin, 78 Ill. 170; State v. Whittemore, 50 N. H. 245.

[3] In Hobart v. Hobart, 45 Iowa, 501, where the statute provided, "No divorce shall be granted on the testimony of the plaintiff; and all such actions shall be heard in open court on the testimony of witnesses, or depositions taken as in other equitable actions triable upon oral testimony, or by a commissioner appointed by the court," the court in its opinion, quoting the statute, say:

jurisdiction, in the sense that its jurisdiction will be presumed in order to support and afford a presumption in favor of the validity of its proceedings in any class of actions, the jurisdiction of the court over actions of that class must be unconditional; and the only thing necessary to enable the court to take cognizance of them is the bringing the defendant before the court in the proper manner, the essential jurisdictional facts appearing of record.[1] In inferior courts the jurisdiction

"The trial required in this section is to be had *in open court*. We are first charged with the task of determining the purport and effect of the words 'open court.' The language is simple and its meaning obvious. The trial must be in a *court*. . . . To constitute the circuit court, then, the circuit judge must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of that court." Lewis v. Hoboken, 42 N. J. L. 379. In the absence of any statute providing to the contrary, the term is lost unless the judge appears at the appointed time and opens court, and all subsequent proceedings are void. People v. Sanchez, 24 Cal. 17; People v. Bradwell, 2 Cow. 445. "The judge has no power to authorize the ministerial officers of the court to exercise judicial power, even in opening and adjourning court, and that, as a consequence, the term expired on the first day of the judge's absence." Wight v. Wallbaum, 39 Ill. 554. In Orman v. Riley, 16 Cal. 186, the court declared the proceedings irregular, if not void, where notice, as provided by statute, of the holding of a special term was not given. See State v. Martin, 2 Iredell Law, 122. In O'Hagen v. O'Hagen, 14 Iowa, 264, it was held that where the parties agreed to hear a cause before the judge at chambers, before the judge in another county from that in which the action was brought, that the court had jurisdiction to so hear the cause at chambers; but in this case stress was laid on the statute that provided the court should be held at the place designated by law, *unless by common consent some other place is fixed upon*. See, also, Wightman v. Karsner, 20 Ala. 451; State v. Peyton, 32 Mo. App. 522.

[1] Applegate v. Lexington, etc. Mining Co. 117 U. S. 269; Grignon's Lessee v. Astor, 2 How. 338. In the case first above cited the court say: "The court which made the decree was a court of general jurisdiction. Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction. Kempe's Lessees v. Kennedy, 5 Cranch, 173; Voorhees v. Bank of United States, 10 Pet. 449; Harvey v. Tyler, 2 Wall. 328. It is to be presumed that the court, before making its decree, took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed." In Harvey v. Tyler, *ubi supra*, Justice Miller said: "The jurisdiction which is now exercised by common-law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. . . . In all cases where the new powers thus conferred are to be brought into action in the usual form of common-law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the

must not only appear upon the face of the record, but be shown to exist. When such jurisdictional facts do appear, every presumption in favor of jurisdiction is indulged the same as though it was a court of superior jurisdiction.[1] If the court be one having general jurisdiction of like subject-matter,

jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court." See Hall v. Law, 102 U. S. 461. In Applegate v. Lexington, etc. Mining Co., *supra*, the court, in closing its opinion, said: "The result of the authorities, and what we decide, is that where a court of general jurisdiction is authorized, in a proceeding either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid." See Prince v. Griffin, 16 Iowa, 552. See, further, *post*, § 180, p. 539; also Smith v. Pomeroy, 2 Dillon, C. C. 414; Cooper v. Sunderland, 3 Iowa, 114; Morrow v. Weed, 4 Iowa, 77; State v. Clark, 30 Iowa, 168.

[1] See last three cases cited above; Church v. Crossman, 49 Iowa, 444; Hodge v. Ruggles, 36 Iowa, 42; Smith v. Engle, 44 Iowa, 265. In the Matter of Hawley, 104 N. Y. 262, the court say: "A surrogate's court is a creation of the statute, of inferior and limited jurisdiction. Those claiming under the decree of a surrogate must show affirmatively his authority to make it, and the facts which give him jurisdiction." In Gilbert v. York, 111 N. Y. 548, the court say: "In Peacock v. Bell, 1 Saund. 78, it is said that 'nothing shall be intended to be without the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.' This statement of the rule has been frequently approved. The rule has been applied in many cases in the supreme court of the United States to test the validity of judgments rendered in the circuit courts of the United States. . . . The circuit courts of the United States, although not inferior courts, are courts of limited jurisdiction. It has been uniformly held that the record of a judgment of a circuit court must affirmatively show the existence of the jurisdictional fact, and that, unless the contrary appears by the record, the presumption is that the case was without its jurisdiction; and it is further held that the question may be raised for the first time on error, and if on examination it is found that the record is silent as to the jurisdictional fact, the judgment will be reversed. . . . We are not aware of any case in this state which controverts the general rule that, in a direct proceeding to review a judgment of a court of limited and inferior jurisdiction, the record must show affirmatively that the court had jurisdiction, or else the judgment will be set aside."

the presumption arises that its proceedings are regular and everything has been done that is necessary to enable it to pronounce the judgment.

The United States district and circuit courts are tribunals of limited jurisdiction. Their powers can only be exercised when the facts which are alleged to set them in motion are such as congress has declared they may take cognizance of; as the diverse citizenship of the parties, the denial of civil rights, the fact that the defendant is an officer of the federal government, or that rights are claimed under the statutes or treaties of such government, or under letters patent issued by it. The plaintiff must allege the jurisdictional facts; when they are shown the presumption is in favor of the regularity of the proceedings.

While nothing is presumed in favor of a court of inferior jurisdiction, if the particular jurisdictional facts appear, it stands on the same footing as other courts of general common-law jurisdiction.[1] So when the proceedings before a court of

[1] Spear v. Carter, 1 Mich. 19, was a case in which a judgment of a justice of the peace recited that it was rendered upon a written confession of the defendants. The statute required such confession to be "signed by the person making the same, in the presence of the justice or one or more competent witnesses." The court held that all that the statute required did not appear, and "nothing is presumed in favor of jurisdiction; it must be affirmatively shown;" that "what is necessary to give jurisdiction must fully appear." Continental Ins. Co. v. Rhoads, 119 U. S. 237, was a case in which the record showed the residence of the defendant in Connecticut, the residence of the deceased at the time of his death in Pennsylvania, and that letters of administration had been granted in Pennsylvania, but did not show that the plaintiff lived there or in any other state. The court held that a jurisdictional fact which must appear to give the circuit court jurisdiction; and by Waite, C. J., said: "It was settled at a very early day that the facts on which the jurisdiction of the circuit courts rest must, in some form, appear on the face of the record (citing many authorities). . . . And, besides, the jurisdiction must appear positively. It is not enough that it may be inferred argumentatively. Brown v. Keene, 8 Pet. 112; Robertson v. Cease, 97 U. S. 646. If the plaintiff was actually a citizen of Pennsylvania when the suit was begun, the record cannot be here amended so as to show that fact, but the court below may, in its discretion, allow it to be done when the case gets back." Keybers v. McComber, 67 Cal. 395: "A justice's court is an inferior court, and its jurisdiction must be shown affirmatively by a party relying upon or claiming any right under its judgments. No presumption will be indulged in favor of the jurisdiction of inferior courts. . . . In superior courts the presumption is in favor of

general jurisdiction do not come within the ordinary proceedings of a court of common law, and the jurisdiction is special and limited, wholly dependent upon a statute, and not tried in the manner of common-law actions, no presumption is indulged

the regularity of their proceedings and of their jurisdiction, and he who challenges either must show affirmatively the grounds of his objection. It does not follow, however, that the rule of decision differs upon the same facts when ascertained. It is only in the mode of ascertaining them that the distinction exists. In a court of record a given fact is presumed, but when shown by the record not to exist, error is made to appear; in a justice's court the same fact must be proven, or it will be presumed not to exist, and like error is manifest. It has been said that the law required courts of special jurisdiction to follow the rules which create and govern them, and that that which in a court of general jurisdiction would be mere irregularity would absolutely deprive the former of all jurisdiction. Whitwell v. Barbier, 7 Cal. 54. Similar language may be found in a number of cases, but an examination shows that in most of them it is used to illustrate the doctrine that in courts of record facts not appearing will be presumed to exist, and their non-appearance will be treated as a mere irregularity, while their absence in cases arising in inferior tribunals will be deemed fatal to the validity of the proceedings. If it appears upon the face of the proceedings that a court of record had no jurisdiction, manifestly it must be as fatal to a judgment as would the absence of the same fact in a court of limited jurisdiction." In Granite Bank v. Treat, 18 Me. 342, the court say: "It is true, as stated in the argument, that no presumption is to be made in favor of an inferior tribunal. Its jurisdiction must appear on the face of its proceedings. . . . The certificate, however, would not be conclusive on this point, and it would be competent for the plaintiff to prove that they had not jurisdiction." This was a case involving the jurisdiction of justices of the peace. In New Jersey R. R. & Tr. Co. v. Suydam, 17 N. J. L., being a case of review of an assessment of commissioners authorized by law to assess damages to improved lands, the court say, on page 30: "If they are not improved lands (whatever that expression may mean) the commissioners have exceeded their authority; they have gone beyond their jurisdiction, and their proceedings, so far at least as relates to that matter, are illegal and void. It is no answer to this objection to say, nor even to prove by evidence *dehors* the record, that the lands in question were improved lands. The fact may be and probably is so, but it must appear on the face of the award, or else the record will be incomplete. We cannot put such supplementary evidence on the record in the clerk's office and thus patch up the award and sustain the jurisdiction of the commissioners. The rule I apprehend to be clear and well settled that persons exercising a special delegated authority must show upon the face of their proceedings that they have acted within their prescribed limit." See *ante*, § 20*b*. In People ex rel. Frey v. Warden, etc. 100 N. Y. 20, an appeal from an order dismissing a writ of *habeas corpus* and remanding relator to custody in which he

in favor of the particular jurisdiction; but where a common-law right of action that abates by the death of a party is by statute made to survive to the administrator, executor or next of kin, or to the wife, then, this fact of survival appearing, the

had been placed by order of a court-martial, the court say on page 25: "Courts-martial and delinquency courts are tribunals of special and limited powers, having jurisdiction only of offenses against military discipline committed by persons belonging to the particular branch of the service for which such courts are organized. . . . It is expressly provided . . . that no person under the age of twenty-one years shall be enlisted without the consent of his parent or guardian, and this requirement is thereby made the condition of a valid enlistment. The existence of such an enlistment thus constitutes a part of the subject-matter of the jurisdiction of the delinquency court, and in its absence the court has no authority whatever over the offense or the person proceeded against. . . . Judgments pronounced by them, when questioned in any collateral proceeding, are of no force or effect as establishing a right to enforce them, unless accompanied by proof of the jurisdictional facts upon which the authority of the court to render them depends. Such proof, whenever furnished, is always subject to the right of the person affected thereby to controvert it, and establish, if he is able to do so, the want of jurisdiction of the court whose authority is disputed. Unlike courts of general jurisdiction, the recital of jurisdictional facts in their records does not furnish *prima facie* evidence even of their existence, but they must be affirmatively proved in order to establish the validity of the judgments rendered." On page 23 the court say: "It is true that it is recited, in the warrant issued by the president of the regimental court-martial, that it satisfactorily appeared to said court that said Frey was and is a member of Company B, in the Eleventh regiment, and while it is possible that such a warrant might be a protection to an innocent officer attempting to execute the process, it does not furnish evidence, in favor of the court issuing it, of the facts therein recited when its jurisdiction is directly assailed." "It is further urged by the respondent that the judgment of the justice cannot be impeached in this collateral action (citing numerous cases in support of the position). But that rule applies more particularly to the judgments of the superior courts of general original jurisdiction, and not to inferior courts of special and limited jurisdiction like that of a justice of the peace. In the former, all presumptions are in favor of their jurisdiction; and their want of jurisdiction must be proved. In the latter, the presumption is against their jurisdiction, and therefore it must be affirmatively shown. The general rule applicable to all judgments is that they cannot be impeached in a collateral action for errors or irregularities, but may for want of jurisdiction." Rowley v. Howard, 23 Cal. 401: "There was no appearance by the defendant; the judgment purports to have been rendered by default; and the mere recital in the docket, viz., 'September 17th; return served summons,' affords no proof of the jurisdictional facts necessary to support the judgment — it is of no weight as proof of the proper service of the

presumption applies as to all other matters pertaining to the common-law trial. So also, where the statute of the state in which the action is brought is similar to the one in which the judgment was rendered, then the presumption of regularity applies.[1] A court may be of limited jurisdiction in some respects, but of general jurisdiction as to the particular matter before it; then in regard to the matters over which its juris-

summons." Kane v. Desmond, 63 Cal. 466. See *ante*, § 20*a*, notes.

[1] Justice Field, in Galpin v. Page, 18 Wall. 371, said: "But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of a court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court." Tyler v. Reynolds, 53 Iowa, 146: "Therefore, a child by adoption cannot inherit from the parent by adoption unless the act of adoption has been done in strict accord with the statute." See Long v. Hewitt, 44 Iowa, 363; Furgeson v. Jones, 17 Ore. 204; 11 Am. St. R. 808; Foster v. Waterman, 124 Mass. 592. See, also, Chesterfield County v. Hall's Ex'r, 80 Va. 321; Holly v. Bass's Adm'r, 68 Ala. 387; Ells v. Pac. R. Co. 51 Mo. 200; Borders v. Murphy, 78 Ill. 81. In Cincinnati, etc. R. R. Co. v. McMullen, 117 Ind. 441; 10 Am. St. R. 67, the court say: "An elaborate argument is submitted in support of the proposition that actions like the present, which were unknown to the common law and are wholly of statutory origin, can only be maintained within the jurisdiction in which the right of action accrued. Hence it is contended, the injury and death having occurred in the state of Ohio, and the right of action, if any existed, having been given by the statute of that state, that the courts of Indiana are without jurisdiction to enforce the statute of the former state. Since the appeal was taken in the present case, this court has decided the question thus presented adversely to the view contended for by the appellant. Burns v. Grand Rapids, etc. R. R. Co. 113 Ind. 169. The further conclusion was arrived at, that according to the weight of authority, as well as upon principle, the jurisdiction of courts to entertain actions, or enforce rights which accrued in a foreign state, did not depend upon whether the right sought to be enforced was of statutory or of common-law origin, provided the right accrued under a statute similar in import and character to one in force in the jurisdiction in which the remedy was sought." See Hale v. Lawrence, 21 N. J. L. 714; 47 Am. Dec. 190; Hahn v. Kelly, 34 Cal. 393; Stoeckman v. Railroad, 15 Mo. App. 503; Boyce v. Wabash R'y Co. 63 Iowa, 70; Dennick v. Railroad Company, 103 U. S. 11; Leonard v. Col. Steam Nav. Co. 84 N. Y. 48; King v. Sarria, 69 N. Y. 24; Phillips v. Eyre, L. R. 6 Q. B. 1; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11; Morris v. C., R. I. & P. R'y Co. 65 Iowa, 732; Pulaski Co. v. Stuart, 28 Gratt. (Va.) 879, and cases cited. See, *contra*, authorities cited by counsel; Dennick v. Railroad Co. *supra;* Secombe v. R. R. Co. 23 Wall. 108; McCahill v. Equitable L. Ins. Society, 26 N. J. Eq. 531.

diction is general the presumption of regularity applies, so that everything should be required to be certified. Justices of the peace have jurisdiction over certain matters; the presumption is applied to them and their courts as to such matters as are ordinarily within their jurisdiction. The true rule is that the presumption of jurisdiction exists whenever sufficient facts appear to show that the action is one within the jurisdiction of courts of that class, and that the parties were properly brought before the court by process, and it possessed the power to try the action. In all cases the essential requisites of jurisdiction must appear upon the record. When we come to collateral attack of judgments this matter will be more fully discussed.[1] The strictness with which the proceedings of a court of special or limited jurisdiction or those of a court of general jurisdiction exercising a special or statutory power are scrutinized applies only in respect to the question of jurisdiction over the person of the defendant or subject-matter. When that is established, the maxim that "all things are presumed to have been rightly and regularly done" applies to them.[2]

§ 23. Special tribunals.— The law creates tribunals, though they are not termed courts, which do not possess the power of courts, sometimes not the power of enforcing their judgments, and yet they are provided for by law, and are in their nature

[1] In Harvey v. Tyler, 2 Wall. 340, Justice Miller said: "There is one principle, however, underlying all these various classes of cases, which may be relied on to carry us through them all when we can be sure of its application. It is that, whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error or set aside by some direct proceedings for that purpose." See notes, to § 20*a*; also, Kempe's Lessee v. Kennedy, 5 Cranch, 173; Voorhees v. Bank of United States, 10 Peters, 449; Ex parte Watkins, 3 Pet. 193.

[2] Davenport, etc. Loan Ass'n v. Schmidt, 15 Iowa, 215: "A court having jurisdiction, every presumption thereafter is in favor of the regularity of its proceedings, and they cannot be inquired into collaterally." Cooper v. Sunderland, 3 Iowa, 114; Pursley v. Hayes, 22 Iowa, 87; Shawhan v. Loffer, 24 Iowa, 268. In the last case cited the court said: "But, when jurisdiction is shown to have attached, the subsequent proceedings of a court of limited jurisdiction, and its decision, whether correct or otherwise, upon every question arising in the case, is binding and conclusive until reversed on appeal." Smith v. Engle, 44 Iowa, 268; Caughlin v. Blake, 55 Iowa, 637.

the courts or rather original tribunals to which resort must be had for the initiatory proceedings connected with important controversies. Their awards are binding on the parties, their findings work an estoppel, and partake of the nature of judgments. They are usually provided for to act in matters in which the public is interested, and which require a speedy determination. In eminent-domain proceedings, where private property is taken for public use, these tribunals are common. Although the right secured is a private one, they are conducted for and by private parties; they are known as sheriff's juries, appraisers, called out to assess damages for condemning rights of way for railroads; also for mill-dams, canals, streets, highways, factories, and the settlement of strifes concerning line fences, levying taxes in aid of railroads, and many other matters unnecessary to mention here. From the findings of these tribunals, where private property is taken for public use, and damages are assessed for such taking, a provision for an appeal to the courts from their action should always be given; but the jurisdiction of the special tribunal must first be invoked as an initiatory step to settle the question and afford direct adequate jurisdiction to the courts, who derive their powers over the subject-matter by the appeal; without such appeal being provided for the statute would be unconstitutional.[1] In such cases the summary proceedings

[1] The proceedings resorted to for the purpose of assessing damages for right of way must be in strict conformity with the requirements of the statute. Portland, etc. R. Co. v. Graham, 11 Met. 1; Contra Costa R. Co. v. Moss, 23 Cal. 323; Southern Pac. R. Co. v. Wilson, 49 Cal. 396; Mobley v. Breed, 48 Ga. 44; Chicago & Alton R. Co. v. Smith, 78 Ill. 96; Lewey's Island R. Co. v. Bolton, 48 Me. 451; Ells v. Pacific R. R. Co. 51 Mo. 200; Bohlman v. Green Bay, etc. R. Co. 40 Wis. 157; Stark v. Sioux City & Pac. R. Co. 43 Iowa, 501; Prospect Park, etc. R. Co., Matter of, 67 N. Y. 371. In the case of Ells v. Pacific R. R. Co., *ubi supra*, the court say: "In this statutory and summary proceeding, this legal *coup de main*, in derogation of common law and common right, the utmost strictness is required in order to give validity; and unless, upon the face of the proceedings had, it affirmatively appear that every essential prerequisite of the statute conferring the authority has been fully complied with, every step, from inception to termination, will be *coram non judice*." In Wilson v. Baltimore, etc. R. Co. 5 Del. Ch. 524, the English and American cases on the subject of notice to land-owners of time and place of hearing are reviewed in proceedings to condemn. The effect of the words "due course of law" and "law of the land" are defined from

give both speedy and adequate relief, and afford, often, an inexpensive remedy to all concerned.

There is another class of proceedings, summary in their character, where the statute gives a right in cases in which the common law gave none, and prescribes the form of remedy to be pursued, without provision for an appeal. In this class of cases the statute must be pursued, and the remedy afforded is the only one; it is strictly confined to the statutory provisions.[1] It may be remarked that law writers have given

a constitutional standpoint, and the constitutional effect of the statute discussed. In Ohio & Miss. R. Co. v. Watcher, 5 Am. St. R. 532; S. C. 123 Ill. 440, the questions arising as to what damages are recoverable for the defective construction of a road, where the right to maintain the improvement has first been obtained by the exercise of the power of eminent domain, is discussed, especially as to the interference with lateral support, damages resulting from blasting, obstructions of flow of water, the recovery in one action or successive ones where the construction is negligent; and the American cases are collected. See, also, Rorer on Railroads, p. 824. As to the preliminary finding on petition of trustees of a township under the Iowa law, where the statute required a petition signed by a majority of the resident freehold taxpayers, a finding that it was signed by half of them was held insufficient to sustain proceedings taken after an election. Slack v. Blackburn, 64 Iowa, 373. So, undue influence, by offering a rebate of part of the taxes levied to those who voted for the tax, renders the proceedings void. Chicago, M. & St. P. R. Co. v. Shea, 67 Iowa, 728. Want of proper notice renders the proceedings void. Allard v. Gaston, 70 Iowa. 731. See page 498. See, also, § 190, and notes. Ragatz v. The City of Dubuque, 4 Iowa, 343, was a case in which the defendant city attempted to appropriate a part of plaintiff's land for street purposes. A jury was impaneled, which assessed his damages at $25. The city tendered him the money, which he declined to receive. The proceeding on the part of the city was under a statute authorizing it, but which failed to provide for an appeal from the proceedings. The plaintiff instituted this action to enjoin the city from entering upon the land until a just sum had been assessed and paid him. The court, in affirming his right to the injunction, say: "Then, suppose a party to be aggrieved by the amount of damages found, or believes the jury have been governed by erroneous rules or principles in arriving at the estimate of damages, where is his redress? No appeal is given or other mode of review. Property of any amount may be taken for public use, and the party has no redress for any error, mistake, misconduct or partiality. The principles of our law require that he should have a remedy, and, in the present instance, either this proceeding must be considered invalid, or the party must be permitted to come into a court of justice and enjoin it, until a just compensation has been ascertained and paid. And he has a right to have it ascertained by a competent tribunal." See chapter XV, *supra*.

[1] In Cole v. City of Muscatine, 14 Iowa, 298, the court say: "A property

little attention to the proceedings of these inferior tribunals; the statutes under which they exist are often loosely drawn and have given the courts much trouble. In some instances legislatures, with the purpose of affording a speedy remedy to meet exigencies, have given special powers of a grave character to these peculiar tribunals, which should have been conferred on regularly organized courts. Great trouble has resulted. In the main this has arisen from giving powers to these *quasi* judicial tribunals that they were unable to properly exercise, they not having the benefit of precedent or experience. Aside from this, the efforts made by legislatures to simplify the remedy have often produced great complexity, and it were better to follow the common law, aided by precedent and established rules, rather than travel in new and untried paths.

§ 24. Illegal courts.— Inasmuch as all courts are the creatures of the law, where the act which provides for their organization is illegal, the court being its offspring, the child must follow the fate of the mother. Whenever, therefore, the record of a judgment of any court is produced as conclusive evidence, its jurisdiction is open to inquiry. Where there is no jurisdiction the action of the court is a mere nullity. It may, on determining that it has no jurisdiction of the subject-matter or the party, set aside an order made, restore the parties to their original rights, as a form, but its order as to costs is a nullity.[1] Officers executing orders or judgments rendered or

holder, therefore, cannot claim the relief afforded by this act and reject the mode therein pointed out for obtaining such redress; or, as expressed by the court, the well-known principle applies that, where a statute gives a right and creates a liability which did not exist at common law, and the statute at the same time provides a specific mode in which such right shall be asserted and liability ascertained, that mode, and that alone, must be pursued." See State v. McGlothlin, 61 Iowa, 314; Conard & Ewinger v. Starr, 50 Iowa, 480; City of Burlington v. Gilbert, 31 Iowa, 356.

[1] In Scully v. Lowenstein, 56 Miss. 652, it is held that the judgment of an incompetent court cannot establish *res adjudicata*. In Luther v. Borden, 7 How. 39, it is announced that the judicial power is not regarded by elementary writers on politics and jurisprudence as a power co-ordinate and commensurate with that of the people themselves, but rather co-ordinate with that of the legislature. See Kendall v. United States, 12 Pet. 524. It is more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other

made by a court without jurisdiction over the parties or subject-matter cannot plead the order or judgment in justification to an action of trespass for seizing the property under such judgment or order; and they become trespassers.[1]

So the appointment of an administrator by a probate court when there is an executor qualified to act, previously appointed by it, and who was capable of acting, is in excess of its powers, and the act is void.[2] Where a person dies testate, naming an executor in his will, the court has no jurisdiction to appoint a general administrator to precede the executor in settling the estate. Such new appointee may be treated as a special administrator, and will be presumed to be one although his let-

things, to keep the latter within the limits assigned to their authority. Bissell v. Briggs, 9 Mass. 467: "Whenever, therefore, a record of a judgment of any court of any state is produced as conclusive evidence, the jurisdiction of the court rendering it is open to inquiry. And upon the same principle, if a court of any state should render judgment against a man not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts; if that judgment should be produced in any other state against the defendant, the jurisdiction of the court might be inquired into, and if a want of jurisdiction appeared no credit would be given to the judgment. In order to entitle the judgment to the full faith and credit mentioned in the federal constitution the court must have had jurisdiction not only of the cause but of the parties." In Mills v. Duryee, 7 Cranch, 484, it is observed, in effect, that the constitution did not mean to confer upon the states a new power or jurisdiction, but simply to regulate the acknowledged jurisdiction over persons and things within their territory. See Story's Conflict of Laws, sec. 609. See, also, Webster v. Reid, 11 How. 437; D'Arcy v. Ketchum, 11 How. 165. In Starbuck v. Murray, 5 Wend. 158, it is said: "Unless a court has jurisdiction it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped by any allegation in that record from proving any fact that goes to establish the truth of a plea alleging want of jurisdiction." See Harris v. Hardeman, 14 How. 334; Christmas v. Russell, 5 Wall. 290; Mackay v. Gordon, 34 N. J. L. 286; Thompson v. Whitman, 18 Wall. 457; Knowles v. Gas Light & Coke Co. 19 Wall. 58; Hill v. Mendenhall, 21 Wall. 454; Hall v. Lanning, 91 U. S. 167; Pennoyer v. Neff, 95 U. S. 730; Renaud v. Abbott, 116 U. S. 287; Hanley v. Donoghue, 116 U. S. 4; In re Sawyer, 124 U. S. 200; United States v. Louisiana, 127 U. S. 182; Wisconsin v. Pelican Ins. Co. 127 U. S. 292; Pennywit v. Foote, 27 O. St. 618; Cable v. Cooper, 15 Johns. 152; Barrett v. Crane, 16 Vt. 250.

[1] Griffith v. Frazier, 8 Cranch, 9; Pickering v. Weiting, 47 Iowa, 243. Numerous authorities in every state could be cited.

[2] See Pickering v. Weiting, 47 Iowa, 243; United States v. Walker, 109 U. S. 266.

ters are general. Such special administrator is not authorized to allow claims, and any notice given by him touching general administration will be held supererogatory.[1] These questions, however, relate to illegal acts of courts rather than to illegal courts. The rule applicable to illegal courts is that a judgment which professes on its face to have been made by a competent tribunal has no legal or binding effect whatever if it was rendered without power given by the government authorized to grant the power.

§ 25. Illegal courts continued.— Although, as has been seen, the legislature cannot ratify, legalize, confirm or aid a void judgment, yet where, as in case of the Confederate States, illegal courts have been established, not under the laws of the government itself, but by a *de facto* government, deriving its authority from an existing rebellion in the district where it existed, this *de facto* government as between its own citizens may be ratified; or if not ratified, is regarded under the law of nations as binding on its people as an existing government while it stood. It has therefore been held that the enactments of the *de facto* legislatures of the insurrectionary states during the rebellion, *which were not hostile to the Union or to the authority of the government of the United States, and which were not in conflict with the constitution of the United States or the constitutions of the states, have the same validity as if they had been enactments of legitimate legislatures.* Whilst the Confederate government existed it was merely the military representative of the insurrection against the authority of the United States, and when its military force was overthrown it perished, and with it its enactments. Its legislative acts, so far as they did not tend to conflict with the supremacy of national authority or the constitutional rights of citizens, have generally been treated as valid.

The judge of a court, where there is a *de facto* government, may be a *de facto* judge, and his acts binding, so far as they relate to the affairs of the state and citizens thereof he represents, and not in conflict with the constitution or valid laws of the state.[2] But it has been held that the judgments of

[1] See last note.

[2] Mauran v. Insurance Co. 6 Wall. 1. This case was on an insurance policy. The vessel had been captured by the southern confederacy. The policy had a clause, "free from

the courts of the southern confederacy have no binding force or effect upon citizens of loyal states; that the civil war suspended proceedings as to them until order was restored, and that the jurisdiction of the court may be inquired into when suit is brought on a transcript of such judgment, and if it appeared that the defendant was a citizen of a loyal state, was sued before the act of secession was passed and employed counsel, and if after the act was passed the attorney, a resident of such rebel state, appeared and failed to plead the existence of hostilities, the defendant being absent, giving the attorney no directions, and the defendant because of the hostilities was excluded from coming into the state after it seceded from the Union, such facts could be successfully pleaded in defense to the jurisdiction of the court and to defeat the judgment.

§ 26. Effect of jurisdictional recitals appearing of record — When may be contradicted.— We have shown in section 1, in defining jurisdiction, that the general requirements of law are that the court must have jurisdiction over the subject-matter and the parties, or that the *situs* of the property must be within the jurisdiction of the court, and the court must have power to hear and try the action. Lest confusion may arise because of recitals appearing of record in the transcript of the judgment, and the effect of such recitals, the evidence necessary to overcome them, if any can be received to impeach the record when it may be introduced, we desire to say that when its recitals show any facts, jurisdictional in their character, which negative the jurisdiction of the court, then the record is self-impeached. Therefore if the recitals show no service on the defendant, or show a service outside of, or beyond, the jurisdiction of the court, or that the defendant, being served,

loss by capture." *Held*, the seizure of the vessel by the so-called Confederate States of America for their benefit was a capture within the terms of the warranty. See Horn v. Lockhart, 17 Wall. 570; Texas v. White, 7 Wall. 700; Sprott v. United States, 20 Wall. 459; United States v. Insurance Cos. 22 Wall. 102, where words similar to the italicised words of the text are used. Bolling v. Lerner, 91 U. S. 594; Pennywit v. Foote, 27 Ohio St. 600. In the last case "all the judges agreed that Willoughby was a judge *de facto*, and that his acts were valid in respect to the public and third parties, even though he might not be rightfully in office." See Griffin v. Cunningham, 20 Gratt. 31; Teel v. Yancey, 23 Gratt. 691; also Winter v. Swinburne, 8 Fed. Rep. 55.

was refused the right to appear and defend, or any other fact destroying jurisdiction in law, the judgment is not voidable but void.[1] When the record of a foreign judgment recites

[1] In Windsor v. McVeigh, 93 U. S. 276, Justice Field, in announcing the opinion, said, after stating that the defendant appeared by counsel and filed a claim to the property and an answer to the libel, the court having struck the answer from the files because it appeared from it that the defendant was at the time of filing the same "a resident within the city of Richmond, within the Confederate lines and a rebel," "The court immediately gave its sentence and decree, condemning the property as forfeited to the United States, reciting that the usual proclamation having been made, the default of all persons had been duly entered." The court further say: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy and could have no *locus standi* in that forum. If assailed there he could defend there. The liability and right are inseparable. A different result would be a blot on our jurisprudence and civilization. . . . That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence." See Bradstreet v. Neptune Insurance Co. 3 Sumn. 600; Woodruff v. Taylor, 20 Vt. 65; Bigelow v. Forrest, 9 Wall. 335; Sabariego v. Maverick, 124 U. S. 292; Alexandria v. Fairfax, 95 U. S. 774; Ex parte Terry, 128 U. S. 307. The rule in New York is the same except as to the matter of contradicting the appearance of an attorney; that is there held conclusive if he did in fact appear in domestic judgments. As to foreign judgments, it is held in Ferguson v. Crawford, 70 N. Y. 257, as follows: "It is well settled by our own decisions that, in the case of a judgment of a court of general jurisdiction of a sister state, although it is entitled to the benefit of the presumption of jurisdiction which exists in favor of a judgment of one of our own courts, yet the want of jurisdiction may be shown by extrinsic evidence; and that even a recital in the judgment record that the defendant was served with process, or appeared by attorney, or of any other jurisdictional fact, is not conclusive but may

that the defendant was served with process; that he appeared in the action by attorney; that the property of the defendant was seized within the jurisdiction of the court; that he appeared personally to the action, or that any other jurisdictional fact existed, such recital can be contradicted; and it may be shown that the defendant was not served; that he did not authorize the attorney to appear for him; that he was not brought within the jurisdiction of the court; that he was brought before it by fraud; that he did not personally appear; that the property was not brought before the court or under its control. The same rule applies to domestic as to foreign judgments, unless the statute may provide a direct proceeding in the court which rendered the judgment, that solely relates to the practice of the state, that should be pursued.[1] This course applies to all cases where an action is brought on the judgment, or the latter is directly attacked. When we come to attacks on judgments in proceedings *in rem*, and where the attack is sought to be made collaterally, we shall more

be contradicted by extrinsic evidence." Borden v. Fitch, 15 Johns. 121; Starbuck v. Murray, 5 Wend. 148; Shumway v. Stillman, 6 Wend. 447; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; Mills v. Martin, 19 Johns. 33.

[1] The court, in Ferguson v. Crawford, *supra*, further proceed to apply the rule to domestic judgments in these words: "When we come to consider the effect of these authorities, it is difficult to find any solid grounds upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question; for, under the provision of the constitution of the United States which requires that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, it is now well settled that, when a judgment of a court of a sister state is duly proved in a court of this state, it is entitled here to all the effect to which it is entitled in the courts of the state where rendered. If conclusive there, it is equally conclusive in all the states of the Union; and whatever pleas would be good to a suit therein in the state where rendered, and none others, can be pleaded in any court in the United States. Hunt v. Hunt, 72 N. Y. 217; Ferguson v. Crawford, 86 N. Y. 611; Moore v. Edgfield, 32 Fed. Rep. 498 (amount in controversy). See Walker v. Sleight, 30 Iowa, 310; Harshey v. Blackmarr, 20 Iowa, 161 (opinion by Dillon); Ferguson v. Teel, 82 Va. 690; Jordan v. Brown, 71 Iowa, 421 (see long list of cases cited); Shelton v. Tiffin, 6 How. 163; Welch v. Sykes, 8 Ill. 197; Thompson v. Emmert, 15 Ill. 415; Chapman v. Austin, 44 Tex. 133; Napton v. Leaton, 71 Mo. 358; Great West Mining Co. v. Mining Co. 12 Colo. 46; S. C. 13 Am. St. R. 204. Compare Abbott v. Dutton, 44 Vt. 546; Hill v. City Cab, etc. Co. 79 Cal. 188.

fully discuss this question. We think the rule applies to all cases. There is, however, an exception to the rule, where the question of jurisdiction is shown by the record to have been raised and determined under a proper issue by the court which rendered the judgment. In such a case the determination made is final, unless it relates to the subject-matter of the action.[1]

The constitution relates to the faith and credit to be given to judgments rendered in sister states, and the provisions of the United States statute, section 905, Revised Statutes, to wit, "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given them in every court within the United States as they have by law or usage in the state from which they are taken," gives the same credit to judgments abroad as they have at home.[2] We therefore lay

[1] In Blaisdell v. Pray, 68 Me. 278, the court, referring to the record of the judgment, said: "But the record of the judgment, after reciting that at the August term, 1873, notice was ordered on the defendants by newspaper publication, runs thus: 'Thence the action was continued to this term. And now at this term it is found to the satisfaction of the court that said order has been complied with;' and thereupon ensues the record of the default. With such a record before us of a finding by the court that notice was given to the defendants, we think that the judgment rendered in pursuance thereof cannot be treated as a nullity or collaterally attacked; but must be regarded to all intents and purposes valid until reversed." Note by author: In this case the opinion shows that the only notice given was the publication of an order entered under the action entitled: "Samuel Blaisdell et al. v. John L. Motley et al.," in which order the name of Pray does not appear; the whole record showed on its face that the defendant was not served. We respectfully suggest that, taking the record as a whole, no jurisdiction was shown. See, also, Hahn v. Kelly, 34 Cal. 391; Callen v. Ellison, 13 O. St. 446; Quivey v. Baker, 37 Cal. 465; McCauley v. Fulton, 44 Cal. 355; Dunham v. Wilfong, 69 Mo. 355.

[2] See note 1 above. Graham v. Spencer, 14 Fed. Rep. 603; Crone v. Dawson, 19 Mo. App. 214; Morey v. Morey, 27 Minn. 265. See cases last cited also. Needham v. Thayer, 147 Mass. 536. In this case the court, by Morton, C. J., said: "The defendant's answer sets up that, at the time when the original suit was brought against him, he was a non-resident and that no service was made upon him. We are of the opinion that he had the right to impeach the judgment by proof of these facts, and that the ruling rejecting such evidence was erroneous." Overruling Hendrick v. Whittemore, 105 Mass. 26, and cases cited. See McCormick v. Fiske, 138 Mass. 379; Short v. Galway, 83 Ky. 501; Jones v. Jones, 108 N. Y. 415; Insurance Co. v. Bangs, 103 U. S. 435. Appearance by attorney, want of authority: Shelton v.

it down as a rule of law, that, while the judgment is conclusive evidence and binding on the parties, and cannot be contradicted by parol evidence, where the parties are before the court, jurisdiction itself goes to the power of the court to act; hence, if the court had no power over the defendant, this fact may be shown to defeat the judgment *in toto*. The same rule applies here that applies to a contract — you cannot vary its terms by parol, but you may always show that it was illegal in its inception, and therefore was not a contract. So it may be shown that the action of the court was illegal because it had no power to act in the given case; not having the power, its acts are a nullity.[1] Where there is no service the rule applies,

Tiffin, 6 How. 163; St. Clair v. Cox, 106 U. S. 350; Earle v. McVeigh, 91 U. S. 503; Knowles v. Gas Light Co. 19 Wall. 58; District Township v. Independent Dist. 63 Iowa, 188; Buckham v. Grape, 65 Iowa, 535; Osborn v. Cloud, 23 Iowa, 104; Kline v. Kline, 57 Iowa, 386. Article 14, second clause section 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." See Pennoyer v. Neff, 95 U. S. 714, passing on this section; Freeman v. Alderson, 119 U. S. 185; Graham v. Spencer, 14 Fed. Rep. 603; Eastman v. Dearborn, 63 N. H. 363; Eliot v. McCormick, 10 N. E. Rep. 705, and note and authorities cited; S. C. 144 Mass. 10.

[1] Washburn v. Carmichael, 32 Iowa, 475. In action to quiet title to land sold by guardian who gave no notice, when statute required he should give such notice as should be required by the court, *held*, the giving of the notice was jurisdictional and the proceeding void, and statute of limitations will not apply. For full discussion of cases as to whether giving of notice is jurisdictional, or whether such proceeding is *in rem* or adversary, see Good v. Norley, 28 Iowa, 188; Boyles v. Boyles, 37 Iowa, 593. Similar in its circumstances to both the above and same disposition made of the case, see notes referred to above under this section. Also, no jurisdiction where there is no appearance and no service of process. Swift v. Meyers, 37 Fed. Rep. 37. Service was only defective, but by publication attack collateral. The Globe, 2 Blatch. Ct. Ct. 427; Pagett v. Curtis, 15 La. Ann. 451; Pomeroy v. Betts, 31 Mo. 419; Kehler v. Jack Mfg. Co. 55 Ga. 639; Wade on Notice, sec. 1138. Where service was obtained by fraud, as where the defendant was fraudulently induced by a letter written by plaintiff to come into the state, and service was then made at plaintiff's office, see Dunham v. Cressy, 21 N. Y. State Rep. 266. Goods were ordered of a non-resident defendant by plaintiff for the express purpose of attaching them and obtaining jurisdiction over him; *held*, no jurisdiction was acquired. Copas v. Anglo Am. Provision Co. 41 N. W. Rep. 690. The court say: "Courts

whether the attack is direct or collateral, in personal judgments, or in acquiring jurisdiction of the thing in proceedings *in rem.*

will not permit jurisdiction of nonresidents to be acquired by fraud, either in procuring personal or constructive service of its process. Here the fraud affects the integrity of the process of the court." Chubbuck v. Cleaveland, 35 N. W. Rep. 362; Van Horn v. Manufacturing Co. 15 Pac. Rep. 562; Larned v. Griffin, 12 Fed. Rep. 590; Townsend v. Smith, 47 Wis. 623. Many cases might be cited; all are cases in which the court set aside the service.

CHAPTER IV.

VENUE OF ACTIONS, LOCAL AND TRANSITORY.

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§ 27. Venue of actions.— The term "venue" means the place in which an action should be commenced. That place may be the state, county, judicial district or township, depending on the statutes governing, the court before which the action is to be tried, the nature of the action, whether transitory or local, the residence of the defendant, and a variety of causes, some of which can be treated of to advantage here, others dependent on the statutes of the state in which the action is to be brought. Ordinarily, as to transitory actions, the statutes provide for their commencement in the county where the defendant resides, or some of the defendants if more than one, where the action is personal in its character; and various provisions are made depending on the courts, their jurisdiction,

and the nature of the action. The practitioner should always examine the statutes of the state, and by their aid, and what can be gathered here, little danger of error will arise.

The venue of an action is jurisdictional, and must be correctly laid. While the court will transfer the action to the proper pláce in the state, when so authorized by statute, when brought in states other than where the action arose it will not lie if the venue is local. Great care must be used in certain classes of actions.

§ 28. **What actions were transitory at common law.**— We find that by the common law all actions that might have arisen anywhere were transitory; as those known as *assumpsit*, debt, covenant, case, trespass to the person or personal property, injury to character, trover, detinue, replevin, and actions for deceit or fraud. *Assumpsit* or promise arose for the violation of ordinary contracts and damages resulting therefrom, and would lie even for torts in the taking of property under an implied promise to pay the value in many instances, and it, in another form, is now the common action to recover in all cases growing out of simple contracts, whether the damages be liquidated or not.[1] The action of debt was one brought on a contract or judgment where the debt was liquidated in amount. The action of covenant was one that was brought to recover damages on sealed instruments, covenants in deeds, breaches of warranty therein and similar actions, and is in use at the present time.[2] The action of case stood in place of our action of negligence, and embraced actions for injury to the realty in cases of nuisance, and in such case was local; also actions for injuries to character, as libel and slander; also for other personal or property rights where the wrong was

[1] Vol. 2 Broom & Had. Com. 249. "The venue laid in the declaration is either transitory or local; local where the cause of action is of such a nature that it could only have arisen in a particular place or county, and transitory when it might have arisen anywhere. Thus, in an action for an injury to real property, the venue is local, while in an action for debt or breach of contract, which is *nullius loci*, and for an injury to the person or personalty, it is transitory." Sumner v. Finegan, 15 Mass. 280; Lienow v. Ellis, 6 Mass. 331.

[2] See Rawle on Covenants for Title, 24–27, 318; 4 Kent, 473. "An action or a form of action at common law to recover for the breach of a contract under seal." And. Law Dict. 289.

not intentional to the extent of direct criminality, and the injury was of such a nature that it arose indirectly rather than by direct violence.[1] Trover was for taking one's goods, or rather for detaining them after they came lawfully in the possession of the defendant, the action being for a wrongful conversion of personal property.[2] The action for detinue also arose out of the unlawful detention of personal property, for its recovery, and for damages for the detention. Replevin would lie for wrongfully distraining personal property, and now is for the recovery of the specific property, vastly different from the common-law action. In one sense it is local, as the writ issues in the county where the property is detained; but it is nevertheless a transitory and personal action, as the place of taking is not the place of the venue, necessarily.[3] Both of the two last mentioned actions, in respect to jurisdiction, are in their nature mixed actions. It has been said that personal property has in contemplation of law no *situs*, but is attached to the person of the owner, wherever he may be; and so inheres to his person. Actions affecting such property are governed by the same law that governs his person; that is, by the law of the place of his domicile.

[1] In Carrol v. Green, 92 U. S. 513, the court define case as follows: "Case is a generic term which embraces many different species of actions. There are two, however, of more frequent use than any other form of action whatever; these are *assumpsit* and trover." Anderson's Law Dictionary, 153, defines case as "A remedy for all personal wrongs committed without force — where the injury is consequential; called 'case' because the plaintiff's whole cause of complaint is set forth at length." The action of case lies for a tort not committed with force, actual or implied; for a tort committed forcibly where the matter affected was not tangible, as for an injury to a right of way or to a franchise; for an injury to a relative right; for an injury resulting from negligence; for a wrongful act under legal process from a court of competent jurisdiction; for a wrongful act committed by defendant's servant without his order, but for which he is still responsible; for the infringement of a right given by statute; for an injury done to property of which the plaintiff has the reversion only. 3 Bl. Com. 122–3, 50–51.

[2] "Trover is an action on the case. It may be joined in case, or new counts in case added to it by way of amendment." McConnell v. Leighton, 74 Me. 416. In form a fiction; in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. Spencer v. Blackman, 9 Wend. 168.

[3] The venue may be laid at any place where the goods are, as they may be considered as taken at any place where the defendant may have carried them. Morris on Replevin, 116; Walton v. Kersop, 2 Wils. 354.

The rule probably does not arise because of any incapacity of personal property to have a fixed *situs*, but out of an enlarged policy, growing out of the transitory nature of such property and personal rights and the general convenience of the people.[1] It is therefore true that all actions arising out of contract, where the nature of the action is to recover damages, and all judgments, when rendered, become a personal debt, due to the holder, which the law implies the debtor has promised to pay, and all actions accruing to the person for infringement of personal rights have no local *situs*, but are transitory.[2] We need not give further description of personal actions, as they form the rule and not the exception.

§ 29. **Where foreigners may sue.**— Although a judgment may have been rendered for an injury to real property, such as in an action for trespass thereto, waste, nuisance, rents and profits, and the like, when the cause of action, though local, has been merged in the judgment, it becomes a mere debt; and while of a high order, it is a personal right, and an action thereon is transitory.[3]

It has already been stated in regard to persons who may sue, that all foreigners who are *sui juris*, and not otherwise specially disabled by the law of the place where suit is brought, may maintain suits for the vindication of their rights and redress for their wrongs, in all transitory actions, in any state where they elect to sue. But it may be stated that, by the common law, debts and choses in action are not, with the ex-

[1] Story on Conf. of Laws, sec. 550, says: "In the next place let us consider the subject of jurisdiction in regard to property. It will be unnecessary to discuss the matter at large as to personal property, since the general doctrine is not controverted, that although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice, that the actual *situs* of the thing should be examined." Story on Conf. of Law, sec. 554, reads: "It has already been stated that, by the common law, personal actions, being transitory, may be brought in any place where the party defendant can be found." Chitty's Plead. 269; 3 Bl. Com. 119.

[2] Laird v. Railroad, 18 Am. St. Rep. 564; S. C. 62 N. H. 254. Buildings placed on the land of another, with the right of removal, being personal property, an action for damages for injury thereto is transitory, and the plaintiff's right may be enforced in the courts of New Hampshire, though the buildings stood upon the land of another in Vermont.

[3] 2 Bl. Com. 465.

ception of bills and notes and other negotiable instruments, assignable. Hence the rule of law is that, if the plaintiff holds title by assignment, where by the law of one state they are assignable, and by the law of the place where the suit is brought they are not, in such case it is believed that, by pleading the law of the place where the assignment was made and the contract arose, the action is maintainable by the assignee in the state where it is commenced. If an action is brought on a claim which was assigned, and the assignment was not valid where it was made, then the title was equitably acquired, and the action will be governed by the law of the place where suit is brought.[1] The parties were competent to assign at common law, but the debt was not the subject of contract. If, however, the cause of action was assignable by the law of the state where it arose and where the suit was brought, then, on familiar principles, the action will lie.[2]

[1] Which property, however, is not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the ancient common law, for no chose in action could be assigned or granted over, because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law. 2 Bl. 441. "An action of debt lies on a foreign judgment. 3 Bl. Com. 160. Judgments recovered in one state and proved in the courts of another differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." Hanley v. Donoghue, 116 U. S. 4; Buckner v. Finley, 2 Pet. 592; D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 467. Martin v. Ihmsen, 21 How. 394. In this case the court say: "The objections to the admission of the paper showing the transfer of the account were equally without foundation. By the law of Pennsylvania, where the transfers were made, Ihmsen would have an equitable interest in the account; but in that state the mere equitable assignee of an account could not sue in his own name, such chose in action not being assignable at common law. There the suit would have been brought in the name of Owen & Ihmsen, the original creditors, for the use of Lorenz, Ihmsen or any other person holding the equitable right to the account. But in Louisiana, where by the rule of the civil law there is no such distinction between the equitable and legal title, Ihmsen, as equitable owner, could sustain the suit in his own name, and the assignments admitted to prove his title were properly received."

[2] In McBride v. Farmers' Bank, 26 N. Y. 457, Selden, J., says: "Nor is there any doubt that the bank had a right to assign the demand. A chose in action against a foreign corporation is not rendered unassignable by

§ 30. Law of place —Effect of.— Where the law of the place enters into and forms a material part of a personal or transitory contract, affecting the liabilities of the parties to it, or where such law creates a right of action and enters into and is the basis of liability, or affects the merits of the action, the universal principle of the common law is that, in regard to the merits and rights involved in the action, the law of the place where the action originated is to govern in determining such right. But the forms of the remedies and the order of the judicial proceedings are to be in accord with the law of the place where the action is brought or instituted, without regard to the domicile of the parties, the origin of the right, or the country in which the act was done or omitted.[1] In other words, the *lex loci* governs as to all things entering into and affecting the obligation, action, right or liability of the parties to the suit in transitory actions, but the rules of practice of the *lex fori* govern as to the manner of trial and remedy afforded under the right or liability established.[2] Therefore, the laws

any provision of the statutes of this state. Probably an action against a foreign corporation could not properly be brought in our courts by a non-resident of the state, unless the cause of action arose or the subject of the action were situated within the state. The inability to maintain an action does not, however, create an inability to assign the demand either to a resident or non-resident of this state, and such assignment in either case would transfer the entire cause of action." Vimont v. Chicago & N. W. R. Co. 69 Iowa, 296.

[1] The later opinions are to the effect that the *lex loci solutionis* prevails. The contract is to be determined by the law of the place where it is made, so far as its formal execution goes, unless the *lex situs* disposed of otherwise requires. Wilson v. Cox, 49 Miss. 538; Ferguson v. Clifford, 37 N. H. 86; Ray v. Porter, 42 Ala. 327; McAfee v. Doremus, 5 How. 53.

[2] So far as concerns the remedy the law of the place of the suit governs, and so far as concerns performance the law of the place of performance governs. Boyd v. Ellis, 11 Iowa, 97; Dalter v. Laue, 13 Iowa, 538; Wilson v. Straton, 47 Me. 120; Cox v. U. S. 6 Pet. 172; Andrews v. Pond, 13 Pet. 65, and numerous cases cited by Wharton in his Conf. L. § 401, and extensive notes. Story on Conflict of Laws, sec. 558, reads: The doctrine of the common law is so fully established on this point that it would be useless to do more than to state the universal principle which it has promulgated; that is to say, that in regard to the merits and rights involved in actions, the law of the place where they originated is to govern. But the form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act. Wilcox v. Hunt, 13 Pet. 378; Ottawa v. Nat. Bank, 105 U. S. 342.

governing exemptions, where they relate to the remedy, the law relating to the enforcement of the remedy, the law relating to imprisonment for debt, and everything pertaining to the remedy, is to be administered under the laws of the state where the action is brought. But if a contract is made in one place to be performed in another, the law of the place of performance is to govern.[1]

§ 31. Presumptions.— The general presumption of law always arises that the laws of every other state are like our own; and where a right of action is given or liability imposed by the laws of one state, and no right of action, or a different liability, arises in another, and the right of action accrued in the former, and suit is brought in the latter, the statute of the state where the right was given must be pleaded to support the right of action in the latter state.[2] If the defendant de-

[1] Canada Southern R. Co. v. Gebhard, 109 U. S. 545. Harlan, Justice, says: "Where the contract is, either expressly or tacitly, to be performed in another place than where made, the rule is in conformity with the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." Cook v. Moffat, 5 How. 307; Story on Conf. Laws, sec. 280.

[2] In Brown v. Knapp, 79 N. Y. 144, the court say: "As this cause of action arose in Connecticut, upon an implied contract which came into existence there, it is claimed that the rate of interest authorized by the laws of that state should control. I am of that opinion; but there was no proof what the laws of that state are as to interest. This is all the case shows on that subject. At the close of the evidence it is stated as follows: 'The defendant's counsel to have the privilege of introducing further evidence as to the laws of the state of Connecticut in regard to the legacy drawing interest, if he shall so desire. Such evidence was afterward offered.' It does not appear what the evidence was which was offered, and it does not appear that any evidence was in fact received; and no evidence as to such laws appears in the case, and there was no finding by the court or request to find as to such laws. It will be observed that the privilege reserved was not as to the rate of interest. What law, then, was the court bound to administer as to the rate of interest? Clearly the law of this state, as no other guide or rule was furnished." See, also, Savage v. O'Neil, 44 N. Y. 298, and Hynes v. McDermott, 82 N. Y. 41, that the same presumption exists as to the laws of foreign countries. In Iowa the court say: "Counsel insist that the state was required to prove that the void marriage was regularly solemnized under the laws of Missouri. Their position is not good. The evidence shows a marriage sufficient in form to be valid under the laws of this state. Under a familiar doctrine recognized by this court, in the absence of proof to the contrary, the law of Missouri pertaining to form and va-

sires to plead that the right of action was barred by the statute of limitations in the *lex loci*, or any other defense, such as usury, illegality of contract, available where the right of action accrued, he must plead the law of the *lex loci*. All such matters as are jurisdictional must be set forth and come before the court.[1]

§ 32. Actions that are local.—The jurisdiction of courts over real property is confined to the *situs* of the property, unless the statute provides for the commencement of the action elsewhere. In many of the states, and possibly in all, the statutes name the class of actions that are local; but it is necessary that the reader should understand the common-law rule concerning the venue of actions. The following actions were local at common law: All actions for the recovery of real property or any interest therein, or the enforcement of any lien thereon, or the enforcement of the specific performance of a contract concerning the same where the property is claimed.[2] All actions brought for injury to real property, such as trespass, waste and nuisance, whereby the realty was injured, or any

lidity of marriages will be presumed to be the same as that of this state. This court has held (State v. Wilson, 23 Iowa, 364) that upon an indictment for adultery, a marriage solemnized in Canada need not be proved to have been celebrated in accord with the laws prevailing there." State v. Nadal, 69 Iowa, 484. See, further, Leiber v. U. P. R. Co. 49 Iowa, 688; Church v. Crossman, 49 Iowa, 444; Neese v. Farmers' Ins. Co. 55 Iowa, 604; Webster v. Hunter, 50 Iowa, 215; Hadley v. Gregory, 57 Iowa, 157.

[1] Crafts v. Clark, 31 Iowa, 77. See note 2, p. 88.

[2] Story on Conflict of Laws, sec. 872*f*: "But, after all, looking to the great diversity of views of foreign jurists, there is much reason to be satisfied with the general rule of the common law on this whole subject; that is to say, that in respect to movables, the law of the place where the contract is made will, with few exceptions, be allowed to govern the forms and solemnities thereof; but as to immovables, no contract is obligatory or binding unless the contract is made with the forms and solemnities required by the local law where they are contracted." Sec. 424: "And here the general principle of the common law is that the laws of the place where such property is situate exclusively govern, in respect to the rights of the parties, the modes of transfer and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed and lost only according to the *lex rei sitæ*." Sec. 428: "The consent of the tribunals, acting under the common law, both in England and America, is, in a practical sense, absolutely uniform on the same subject. All the authorities in both countries, so far as they go, recognize the principle in its fullest import, that real

building, shrub, tree, plant, or the rental thereof.[1] Also, all injuries growing out of or to the land, as waste, or injury to any incorporeal or corporeal right attached to or growing out of the land, and all actions for the detention of real property.[2] All actions for the recovery of profits arising from the property, rents of the property, founded on privity of estate, against the lessor or his executor, against the assignee of the term, or by the assignee of the term against the lessor. So also actions of debt or covenant by the assignee of the reversion against the lessee, or an assignee of the term, or against the assignee of the term by the assignee of the reversion, are local.[3] Contracts concerning real estate are governed

estate or immovable property is exclusively subject to the laws of the government within whose territory it is situate."

[1] 1 Chitty on Pleading, 281*: "When the cause of action could only have arisen in a particular place or country, it is local, and the venue must be laid therein. As in real actions, mixed actions, waste, *quare impedit*, or ejectment, for the recovery of the seizin or possession of land or other real property, so actions, though merely for damages occasioned by injuries to real property, are local, as trespass or case for nuisances, or waste, etc., to houses, lands, water-courses, right of common ways, or other real property, unless there were some contract between the parties on which to ground the action." Summer v. Finegan, 15 Mass. 284; Graves v. McKeon, 2 Denio, 639; Brown v. Caldwell, 10 Serg. & Rawle, 114; Baker v. Howell, 6 id. 476. Debt on bail bond, although generally transitory, must be brought generally in the same court as the original suit. 2 Chitty on Plead. 445. In Hall v. Decker, 48 Me. 256, the court say: "Actions which do not seek the recovery of land may be local by the common law, because they arise out of some local subject or from the violation of some local right or interest, as waste, trespass *quare clausum*, actions on the case for nuisances to houses, or for disturbance of right of way, or for the diversion of a water-course, and the like."

[2] The venue in the action of trespass *quare clausum fregit* should be laid in the county where the real property injured is situated. Barnes v. Davis, 2 Iowa, 160. So, under the Code of 1851, held that the venue to foreclose a title bond must be brought in the county where the land is situated. Johns v. Orcutt, 9 Iowa, 350. Under the present Iowa statute a suit to foreclose a mortgage, where the lands are in different counties, may be brought in the county where any part of the lands lie. Lomax v. Smyth, 50 Iowa, 223. And now where an action is brought to enforce a lien on lands, it should be brought where the lands are situated. Hawke v. Urban, 18 Iowa, 83. And in an action to foreclose a mortgage, where notice is served by publication, the proceedings cannot be had in a county where the land is not situated. Iowa Loan & Trust Co. v. Day, 63 Iowa, 459.

[3] Addison on Torts (Wood's ed.), p. 113, sec. 100: "The venue or statement in the margin of the declara-

by the law of the place where they are to be performed — where the property lies; and hence the rule is that if a person is incapacitated by the law of the domicile, as by not being of full age, or by being a married woman and incapable of conveying without her husband joining with her, yet her conveyance is good if valid under the law of the place where the land is situated,[1] the formalities of the contract being governed by the law of such place.

Actions cannot usually be brought in one state for official misconduct in another state, and often the action is confined to the county where the cause of it arose.[2] In fact actions on official bonds are local, and the jurisdictional amount is to be determined by the sum claimed by the plaintiff and not the penalty of the bond.

The reader cannot fail to see the importance of this common-

tion of the name of the county from whence the jury are to be summoned and where the cause of action is to be tried is local in all actions for infringements of territorial rights annexed to lands or tenements, so that the cause of action must be laid or tried in the county in which it arose, unless a judge's order is obtained for changing the venue and place of trial. . . . If the plaintiff complains of the diversion or fouling of water from a natural watercourse, he must declare upon his own possession of the place through which the water used to run."

[1] Judge Story says (sec. 551, Conflict of Laws): "In respect to immovable property, every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be forever incapable of execution *in rem*." Again in section 552: "Real actions ought to be brought in the place *rei sitæ;* and this is the rule not only when the property in controversy is situate in the same kingdom, but also when the parties, being domiciled in one country, engage in a litigation as to property locally situate in another country." Section 435: "The rule is established in America, where it is held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where the property is situate." And in section 368: "Thus, in respect to the capacity of persons to contract," the doctrine of foreign jurists "is that if they are of age to contract in the place of their domicile, but are not in the place where their immovable property is situate, the contract to alienate or sell the latter will be valid everywhere; and so *vice versa*. Others hold a different opinion, and insist that, whatever may be the law of the domicile as to capacity, and although it governs the person universally, yet it does not apply to immovable property in another country." See secs. 431, 432, Story's Confl. of Laws.

[2] Suits against public officers for official acts must be brought in the county where the acts are performed. Clay v. Hoysradt, 8 Kan. 74.

law rule as to venue, particularly in actions *in rem*, that the action, if local, be brought where the real property is situated.

Statutes often do not specify, except in very general terms, what actions are, and what are not, local, and what may, and what may not, be brought in the county where they arose; and much technical nicety often surrounds and distinguishes the class known as transitory actions and the class known as local actions.

Where an action is commenced and different causes are joined, some of which are local and some transitory, and the causes are in part actionable in the county, those not triable there should be stricken out on motion. If a motion to that effect is not made, the location of the real estate controls the place of the trial.[1]

§ 33. Mixed actions.— A mixed action is an action brought for the recovery of lands, specifically, as a real action, but has joined with this claim one for damages in respect to such property; as actions for waste, dower and for specific performance of a contract in equity, where the party has been deprived of possession.[2]

Strictly speaking, all actions for the recovery of personal property are personal actions; yet, so far as jurisdiction is concerned, they may take on in some respects the nature of mixed actions, as they have connected with them a claim for damages; as, in replevin for the loss of the use of the property, in actions for divorce where alimony is claimed, all of which will be treated of under the head of proceedings *in rem*.

Mixed actions are local, and the jurisdiction lies within the

[1] Acker v. Leland, 96 N. Y. 383.

[2] Story on Conflict of Laws, sec. 554: It will be perceived that in many respects the doctrine here laid down coincides with that of the common law. It has been already stated that by the common law personal actions, being transitory, may be brought in any place where the party defendant can be found (personal injuries are of a transitory nature *et sequunter forum rei*. Lord Chief Justice De Gray, in Rafael v. Derelst, 2 W. Black. 1058. See Mostyn v. Fabrigas, 1 Cowper, 161, 176, 177; Robinson v. Bland, 2 Burr. 1077; S. C. 1 W. Black. 256); that real actions must be brought in the *forum rei sitæ*, and that mixed actions are properly referable to the same jurisdiction. Among the latter are actions for trespasses and injuries to real property, which are deemed local, so that they will not lie elsewhere than in the place *rei sitæ*. This distinction was recognized as long ago as 1665 in Skinner v. The East India Co., cited in 1 Cowper, 167, 168.

county or state where the land is, usually within the county, always within the district over which the court presides.[1]

In mixed actions, where the claim for damages is in its nature personal, and the court has taken jurisdiction *in rem* at the place where the land is situated or where the damages are severable, such damages are personal and transitory, and may be recovered as such.[2]

§ 34. Venue — Real or local actions continued.— The necessity of determining the correct venue before the action is commenced cannot be lightly passed over, for, if it is local and is brought in the wrong county, it may be defeated on the trial or a demurrer will lie because of want of jurisdiction.

The statutes of the different states usually provide that actions shall be brought in the county or district where the defendants, or some of them if more than one, reside. But, in general, the statute provides that real actions, or actions relating to real property, shall be brought in the county where the property lies. If the statute does not so provide, the action would be local by common-law rules, which are usually adopted in this country by general consent.[3] In order, there-

[1] A "real action" is brought for the specific recovery of lands, tenements or hereditaments. It includes every form of action where the judgment is for the title and possession of the land demanded; as, ejectment. A "mixed action" is brought for the specific recovery of land, as in a real action, but has joined with this claim one for damages in respect to such property; as, actions of waste and dower. A "personal action" is brought for the specific recovery of chattels, or for damages or other redress for breach of contract and other injuries of every description, the specific recovery of lands and tenements only excepted. Hall v. Decker, 48 Me. 255–56 (1860); Anderson's Dictionary of Law, p. 27; North. Ind. R. R. Co. v. Mich. Cent. R. R. 15 How. 233; McKenna v. Fisk, 1 How. 241; Watts v. Kinney, 28 Wend. 484; Champion v. Doughty, 18 N. J. L. 3; Am. Un. Tel. Co. v. Middleton, 80 N. Y. 408; Craigin v. Lovell, 88 N. Y. 263. This case holds: "We have now only to inquire whether the defendant could properly allege as a counter-claim the damages sustained by waste committed to land situated outside of this state. If the defendant had sued the plaintiff upon the cause of action alleged in her counter-claim, a demurrer to her complaint on the ground the court did not have jurisdiction of the subject of the action would have been sustained. It is a general rule of law that actions for injuries to real property must be brought in the forum *rei sitæ*, and this rule of law has been, so far as I can discover, uniformly sanctioned and upheld in this state." De Courcy v. Stewart, 20 Hun, 561.

[2] See note 2, p. 87, and note 1, p. 88. Wharton on Conf. of Laws, § 290.

[3] An action for injury to growing

fore, to commence an action, local by common law, it is necessary to see that the statute makes express provision for the trial of it as a transitory one. Where the action is local, the venue must be laid in the county in which the land is situated, unless it is otherwise provided by statute.[1]

It has been held that the action of trespass *quare clausum fregit* is local; nuisance, where the injury affects real property, has also been held to be local; it has also been held, however, that this action would lie either as a local action, or, where the wrong was committed by fouling a stream in one county that passed through the plaintiff's close in another county, that the action would lie in the county where the stream was fouled, because the wrong was there committed, or in the county where the land was situated, because the damage was done at that place.[2] Actions for waste, for the foreclosure of mortgages, for the quieting of title, for specific performance of contracts, for the sale of real estate, for the establishing of vendors' liens, ejectment and rents of the class before mentioned, must be commenced as local actions.[3] It

crops may be brought in the county where defendant resides or may be summoned. Duncan v. Yordy, 27 Kan. 348. Actions to collect drainage assessments in Indiana are local, although the owner of the land resides in another county. Dowden v. State, 106 Ind. 157. The California constitution requires actions for the enforcement of liens on real estate, etc., to be brought in the county where such estate is located. *Held*, not to apply to an action for the enforcement of a trust on real and personal estate. Le Breton v. San Francisco Superior Court, 66 Cal. 27.

[1] See above and note 2.

[2] An action to abate a nuisance which injures real property is an action for "injuries to real property" within the statute requiring such actions to be tried in the county where the property is situated, unless sufficient cause for a change of venue is shown. Marysville v. North Bloomfield Gravel Mining Co. 66 Cal. 343; Gordon's Appeal, 93 Pa. St. 361; Bondies v. Buford, 58 Tex. 266; Hancock v. Burton, 61 Cal. 70. Trespass *quare clausum fregit* will not lie for trespass committed in another state. Niles v. Howe, 57 Vt. 388; Cahn v. Bonnett, 62 Tex. 674; Fletcher v. Cooper, 59 How. Pr. 373; Jacks v. Moore, 33 Ark. 31; Maduel v. Tuyes, 30 La. An. part 2, 1404; Bush v. Treadwell, 11 Abb. Pr. (N. S.) 27; Leland v. Hathorn, 42 N. Y. 547.

[3] In the case of a conflict of laws, the laws of the country or state in which is situated the land which is the subject of the power will control. Sewall v. Wilmer, 132 Mass. 131. And see Bingham's Appeal, 64 Pa. St. 345. An action to set aside a fraudulent sale of land by an administrator, to annul the order of sale for want of jurisdiction, and to enjoin the dispo-

also follows as a natural and rational sequence, that this class of actions cannot be brought in a foreign jurisdiction as actions at law; and that courts of chancery have no jurisdiction over them to enforce contracts or determine any right affecting the *status* or title to the property, except they may in the exercise of jurisdiction where the contract was made, sometimes (if the parties both reside within the jurisdiction of the court), by decree acting on the party defendant, compel him to comply with the order of the court, and enforce the judgment by punishing him for contempt. Such judgment or decree, however, is utterly nugatory, and forever incapable of execution *in rem*.[1] A bill of revivor must be brought in the county where the records are; also, to open a judgment, even though the county has been divided and the land lies in the new county, the division having taken place since the judgment was rendered.[2] In partnership accounts, the court hav-

sition of the proceeds of the sale, involves the determination of a right or interest in real property within California Code of Civil Procedure, section 392, and is to be tried where the real property is situated, rather than where the defendants or some of them reside at the commencement of the action, although the order of sale was made in the county of the defendant's residence. Sloss v. De Toro, 77 Cal. 129; 19 Pac. Rep. 233.

[1] Under such section an action for the reformation of a contract of sale of land must be tried in the county where the land is. Franklin v. Dutton, 79 Cal. 605; 21 Pac. Rep. 964. So an action to restrain a threatened injury to real property is an action for "an injury to real property" within the meaning of such section, and must be tried in the county where the real estate is situated. Drinkhouse v. Spring Valley Water-Works, 80 Cal. 308; 22 Pac. Rep. 252. Under the Georgia constitution equity cases must be tried in the county of the residence of some defendant against whom substantial relief is sought. If a bill to set aside sheriff's deeds is filed in the county where the sheriff lives, instead of in the county where the grantee lives, a demurrer lies for want of jurisdiction. Caswell v. Bunch, 77 Ga. 504. A replevin suit is not necessarily local because it incidentally involves the title to the land on which the timber which is the subject of such suit was cut. Busch v. Nester, 62 Mich. 381. Iowa Laws of 1884, chapter 126, provides that suits to foreclose mortgages must be brought in the county where the land lies. Held to apply to a suit to foreclose a mortgage given before the enactment, and that the requirement was jurisdictional and could not be waived by a failure to move under Iowa Code, section 2589, for a change of venue. Orcutt v. Hanson, 71 Iowa, 514; Cohn v. Central Pacific R. R. Co. 71 Cal. 488; Baker v. Fireman's Fund Ins. Co. 73 Cal. 182.

[2] In Murfree on Official Bonds, section 479, it is observed: "Thus, a

ing jurisdiction of the parties and subject-matter may decree a division, though the lands are out of the state or county, but the judgment only affects the parties if the land is out of the state.[1] When the plaintiff joins a local action with a transitory one, and service is made in the wrong county as to the former, a demurrer or plea in abatement will lie to the local action, or in some states a nonsuit will be granted at the trial as to it.[2]

judgment for the amount of the penalty of an official bond, $2,000, to be discharged by the payment of $150 damages, rendered by a justice of the peace, was held valid, the amount of the damages being within the jurisdiction of the justice, although the amount of the judgment, $2,000, was not. The court say: The action is not upon the bond for a sum certain, nor is the bond for the payment of a liquidated amount, or a bond for the payment of money, as in section 824 of the code; but the suit is brought to recover damages for an act in the nature of a tort. State ex rel. v. Luckey, 51 Miss. 528; Harrison v. Park, 1 J. J. Marsh. 174. There is a like ruling as to the jurisdiction of justices of the peace in Iowa. The penalty of the bond (not, however, an official bond) was $300, which sum was above the jurisdiction of the justice, the amount claimed was $100, which was within his jurisdiction, and the court held that the amount claimed was the criterion of jurisdiction, not the penalty of the bond. Stone v. Murphy, 2 Iowa, 35." And to the same effect is a New York ruling. Boomer v. Laine, 10 Wend. 525.

[1] Murfree on Official Bonds, section 478: "Jurisdiction of a statutory or official bond is limited to the courts of the state by the legislation of which its execution is authorized. It will not be enforced as an official bond by the courts of any other state, or, at least, to give it legal validity, it must be predicated upon legal requirements in force in *loco contractus*. Without such basis the instrument is void. The Vermont court say that 'when an official bond is, by the law of the state where it is executed, to have effect only in a particular way, and to be enforced only in a particular mode pointed out by those laws, the enforcing it in that mode is the exclusive province of the tribunals of that state.' Pickering v. Fisk, 6 Vt. 102. And in Ohio, it has been held that a suit upon an official bond executed in Indiana cannot be sustained in the former state, so as to charge the obligors in the bond with statutory penalties for misfeasance in office, the penalties being prescribed by the laws of Indiana. The court decides that the Indiana statute is penal in its character, and says: 'The penal laws of one state can have no operation in another state, or be enforced by the courts of another. Penal laws are strictly local, and affect nothing more than they can reach.' Indiana v. John, 5 Ohio, 217; Folliott v. Ogden, 1 H. Black. 135; Holman v. Johnson, Cowp. 341; Scoville v. Canfield, 14 John. 338, 340; 7 Am. Dec. 467."

[2] See, also, Davis v. Kimball, 74 Iowa, 84, where the court say, per Rothrock, J.: "The defendants did not demand that the venue of the whole suit or action be changed. They could not rightfully do this, because the court at Avoca had juris-

diction of the action so far as it related to the promissory notes payable at Avoca. They demanded that the petition should be divided, and part of the claims should be tried at one place and part at another. This they had no right to require. They were rightfully in court at Avoca on that part of the suit which was brought upon the promissory notes. If they did not desire to try the other counts of the petition, then they should have moved to strike them from the petition. But the plaintiff saved them that trouble by striking them out on her own motion."

CHAPTER V.

ACTIONS, WHERE BROUGHT — TERRITORIAL JURISDICTION OF COURTS.

Territorial jurisdiction — Action must be brought in county of defendant's residence — Venue — If not in county of residence venue may be changed — Want of jurisdiction as to venue, how raised — Venue where place of payment is fixed by contract — In federal courts suit must be brought in proper district . . . . . § 35

Action must be brought in the territory where the defendant resides — Jurisdiction in justices' courts, how limited — Service must be made within jurisdiction — Want of jurisdiction a defense . . . 36

Venue, change of; causes for — Justice of the peace where the title is involved must certify cause — Judge cannot try cause when interested 37

Change of venue; discretionary and imperative, when — Transcript must be filed by party asking change — In criminal cases discretion is exercised in favor of defendant 38

Venue as against non-residents — Venue as in local actions — Service must be obtained in state — Should be brought where property of non-resident is seized — Non-residents may sue same as citizens — Constitutional provisions 39

§ 35. Territorial jurisdiction.— While in legal discussion one subject overlaps another to some extent, an effort has been made to confine the discussion as closely as possible to the boundaries marked by the text in order to avoid confusion. The national and the state legislatures have sought to so arrange courts and their jurisdictions that an action may be brought in the territory where the parties, particularly where the defendants, reside.[1] As a rule an action in the superior courts must be brought in the county where the defendants, or

[1] Wells on Jurisdiction, sec. 117: "We now consider the subject of venue, in its more common view, in relation to different counties of the same state, as usually, for the purpose of convenience, courts of original jurisdiction are limited to a single county and sometimes to a smaller territory, as a town or city. And, in a modified form, the same principles, to a considerable extent, apply to such limits as to those of a state jurisdiction. The division of a county does not, however, oust jurisdiction already attached in pending causes. Barnes v. Underwood, 54 Ga. 87."

some of them, reside. In some states it is provided by statute that if the action is brought in the wrong county or district the venue must be changed on showing the fact; but, unless objection is made to the jurisdiction, the action is to be there tried. In other states the rule is that the want of jurisdiction can be pleaded in abatement and raised by motion or demurrer.[1] Sometimes the territorial limitations relate to the residence of the plaintiff, when a resident; sometimes to the residence of the defendant or some of the defendants; sometimes, by express contract, the place of payment is stipulated in the writing, and the jurisdiction is controlled thereby.[2] The statutes of the state must be carefully consulted in all such matters by the practitioner, and their contents concerning the place of commencing an action in superior courts as well as inferior ones carefully analyzed. The federal courts hold ses-

[1] Morgan v. Lyon, 12 Wend. 265: "The question whether the action be or be not local cannot be agitated on this motion. If it appear on the face of the declaration that the action is local and the venue is laid in a wrong county the defendant may demur; if it does not so appear he may plead the fact in abatement or avail himself of the mistake by nonsuiting the plaintiff at the trial. 1 Chitty's Plead. 284; Rightmyer v. Raymond, 12 Wendell, 51." In the practice of the English high court it is not usual to allow an action to be brought, if it is obvious that it cannot be enforced; such, for instance, as an action to recover lands in a foreign country. See notes to Mostyn v. Fabrigas, 1 Smith Lead. Cas. 683. See Davis v. Kimball, 74 Iowa, 84.

[2] In Wells on Jurisdiction of Courts, section 117, it is said that where a court has jurisdiction (as in partnership accounts) of the persons and cause of action, proceedings *in rem* may attach as an incidental remedy, so that the court may order a sale of lands in another county, as has been done in regard to lands in another state. Webb v. Wright, 2 Bush (Ky.), 126. And, on the other hand, "if there are equities arising from contract or by operation of law, by virtue of which a party is entitled to subject specific property, real or personal, to sale for the purpose of satisfying a debt," jurisdiction *in rem* may be taken, even when both parties reside out of the jurisdiction. "Whenever it becomes necessary for the decree to act upon the thing, (directly) upon the particular property, the jurisdiction attaches to the thing, abides with it, and can only be brought into action by suit in trespass *quare fregit* (Gordon v. Merry, 65 Me. 168) where the thing is;" even if all the parties reside elsewhere, as in La Trobe v. Hayward, 13 Fla. 208. Divorce is regarded as a proceeding *in rem* because it fixes the *status* of persons. But where the statute requires the residence of the applicant, it means a *bona fide*, permanent residence, and not a temporary one for the mere purpose of applying for the decree. Whitcomb v. Whitcomb, 46 Iowa, 437.

sions in each state and are divided into districts or divisions, and the suit must be commenced in the proper district or division.[1]

The convenience of parties, the saving of expense in procuring witnesses, the acquaintance of jurors with the parties, all require that actions should be brought in the district or county where the parties reside; and this is particularly applicable to defendants.

§ 36. Territorial jurisdiction continued.— Local courts are established with different jurisdictions; special jurisdiction is given to inferior tribunals which they can only exercise in a limited territory; sometimes it is restricted to a city, a township or county. The rule is that the action must be brought within the territory where the defendants, or some of them, reside; if they are non-residents, and the action is transitory, and no place of performance has been agreed upon, jurisdiction may be exercised wherever the parties are found. The jurisdiction of justices of the peace is usually limited to the county in which they hold their courts, often to the township in which the defendant is sued or the adjoining township; and city courts are limited to the city or county.[2]

[1] The jurisdiction of the district court over parties is acquired only by service of process or their voluntary appearance. It has no authority to issue process to another state. In this case the absent defendants declined to appear, and process could not be served, so that the court was without any jurisdiction over the essential parties to the bill. There was no course open to it, except to dismiss it for the want of jurisdiction, upon the motions submitted for that object. Toland v. Sprague, 12 Pet. 300; Herndon v. Ridgway, 17 How. 424; Desty's Fed. Proc. § 740; U. S. Rev. Stats. §§ 741-2. By the judiciary act, where jurisdiction of the circuit court depends on citizenship, every citizen must have resided or been served in the district where suit is brought. McMicken v. Webb, 11 Pet. 25; Toland v. Sprague, 12 id. 300; Levy v. Fitzpatrick, 15 id. 167; Jones v. Andrews, 10 Wall. 327; Chaffee v. Hayward, 20 How. 208; Wickliffe v. Eve, 17 id. 468; Ins. Co. v. Bangs, 103 U. S. 435; Herndon v. Ridgway, 17 How. 424.

[2] Transitory actions should be brought in those counties only where the court would be entitled to try and decide them upon their merits; such actions should not be brought in a county where neither party resides, to be thereafter transferred to the proper county for trial. Hawes' Jurisdiction, § 24, citing Haywood v. Johnson, 41 Mich. 598; Barnard v. Hinkley, 10 Mich. 458; Detroit F. & M. Ins. Co. v. Judge, 23 Mich. 492. In actions before justices of the peace consent cannot confer upon courts a greater power than the law confers. Parties cannot by agreement give jurisdiction to courts which could not

When suit is brought outside of the jurisdictional limits of a county, city or township, the fact may be pleaded in defense in abatement. When service is made a demurrer will lie; and in some states a nonsuit may be granted at the trial, within the jurisdiction. If service is made out of such limits there is no jurisdiction.[1] Want of jurisdiction can be pleaded, usually, for the special purpose of the case, but may be waived by a general appearance. We are discussing cases where the action is transitory and the defendants are residents of the state or sued within the jurisdiction.

§ 37. **Change of venue — Causes for.**— There are various causes which may authorize and require a court to transfer a cause to another court of the same jurisdiction, or to the same court held in another place. The judge may be interested or may be a material witness for a party; he may be a near relation by blood or affinity; or, by reason of prejudice or bias, shown to be by statute disabled to try the case.[2] Sometimes the cause may be removed because of local prejudice of the people against the parties. Various statutory causes exist, some without any apparent reason, and on account of the influence of one of the attorneys for the parties.[3] Sometimes

be exercised by virtue of legal process. Hence, under a statute limiting the jurisdiction of justices of the peace to actions against residents of the county in which the action is brought, consent of the defendant cannot give jurisdiction of an action begun in any county other than that of his residence. Chapman v. Morgan, 2 G. Gr. 374; Boyer v. Moore, 42 Iowa, 544; McMeans v. Cameron, 51 Iowa, 691.

[1] That a suit before a justice is brought in the wrong township is not ground for a change of venue. Such fact should be pleaded in abatement. Whether a motion to dismiss would be proper in such case, *quære*. Meunch v. Breitenbach, 41 Iowa, 527. But the justice does not have jurisdiction of an action for the recovery of money against a resident of another county, although an attachment is sought in such action against property in the county where suit is brought. Gates v. Wagner, 46 Iowa, 355.

[2] Cooley, Const. Lim. 175: "And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive or judicial, and wholly unknown to constitutional government."

[3] Cooley, Const. Lim. 6th ed. 506: "No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of parliament made against natural equity, as to make a man a

the want of jurisdiction of the subject-matter will justify a change of venue in place of dismissal; as by pleading some fact as a defense that the court in which the action is brought cannot hear, as where an issue of title is raised.[1]

These applications, where the ground is prejudice of the court, the people, or some cause not known to the court, must be made promptly, and sufficient facts shown under the statute to warrant the change. If the showing is insufficient, the court to which the change is made may have no jurisdiction, in case of an appeal, and in some cases not in a collateral proceeding.[2]

§ 38. Of change of venue.— The change of venue in some cases is discretionary, but there must be no abuse of a sound discretion.[3] In other cases it is imperative and must be granted after a proper showing.[4] In some states the ground may rest in the action being brought in the wrong county, or it may be the convenience of witnesses; whatever the reason may be, the application, when action upon it is not discretion-

judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*.' Co. Lit. sec. 212. We should not venture to predict, however, that even in a case of this kind, if one could be imagined to exist, the courts would declare the act of parliament void; though they would never find such an intent in the statute if any other could possibly be made consistent with the words. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence." Washington Insurance Co. v. Price, Hopk. Ch. 1; Dimes v. Proprietors of Grand Junction Canal, 3 H. of L. Cas. 759; Pearce v. Atwood, 13 Mass. 340; Peck v. Freeholders of Essex, 20 N. J. L. 457; Commonwealth v. McLane, 4 Gray, 427; Dively v. Cedar Falls, 21 Iowa, 565.

[1] The fact that the judge before whom the case is tried has previously been counsel for one of the parties will not render judgment by him void. Objection should be made by motion for a change of place of trial. Jewett v. Miller, 12 Iowa, 85.

[2] An affidavit of undue influence of the attorneys for the opposite party will not be sufficient to support an application for change of venue on that ground after some of the attorneys have withdrawn from the case. Anderson v. Leverich, 70 Iowa, 741.

[3] The question of allowing the change rests in the sound discretion of the court, and unless such discretion has been abused the court on appeal will not interfere. State v. Ostrander, 18 Iowa, 435, 447; State v. Ross, 21 Iowa, 467; State v. Collins, 32 Iowa, 36; State v. Felter, 32 Iowa, 49.

[4] But this discretion is not absolute nor arbitrary. State v. Hutchinson, 27 Iowa, 212.

ary, must be granted if its allegations comply with the statute. When discretionary, the exercise of a sound discretion is essential.[1]

The exercise of the power and method and condition upon which the statute grants the power to change the venue must be strictly pursued. The transcript must be filed by the party obtaining the change, if that is a condition; the costs must be paid, cost bond given, and every other statutory provision complied with, or the court does not release jurisdiction over the cause.[2] Sometimes in actions against counties, cities and municipalities the change is made on that ground, but all the statutory causes need not be noticed.[3] As to the practice to procure the change, I can only refer the reader to the statutes and local practice of the state.

Similar grounds exist for changing the place of trial in criminal actions, and in the notes adjudications are referred to as well in criminal as in civil cases. The only distinction rests

[1] If it appears that the discretion has been improperly exercised, the action of the court will be reversed; and in the particular case the refusal to grant a change was held error. State v. Canada, 48 Iowa, 448. It is necessary that the justice granting a change shall designate by name the next justice to whom the case is sent. This is a judicial determination, and in no other way can it be known who is the proper justice to whom the case has been transferred. Until the justice does determine and designate such nearest justice, the change of venue is not complete and no other justice can acquire jurisdiction. Bremner v. Hallowell, 59 Iowa, 433.

[2] It may be a doubtful question, under these provisions, whether a justice of the peace, elected for one township, may hold court in another township under the circumstances shown in this case. But its determination is not necessary to the decision of this case. In this case the motion was to dismiss the cause. If the justice of the peace who tried the cause had no jurisdiction to do so, his acts in that matter were void acts, and ought not to prejudice the plaintiff's cause of action. His action ought not to be dismissed because he had failed to secure a valid trial and judgment; but only such void and improper acts ought to be disregarded, and the plaintiff's cause should be fairly and legally tried. If the justice had jurisdiction then the judgment was valid and the cause ought not to be dismissed. In either event, therefore, it was not error to overrule the motion to dismiss the cause. If, as is assumed in the motion, the district court had no jurisdiction of the appeal, it ought not, therefore, to dismiss the cause, but only the appeal. Ely v. Dillon, 21 Iowa, 48.

[3] In a particular case, *held*, that the showing for a change was sufficient to render the action of the court in refusing it erroneous. State v. Nash, 7 Iowa, 347, 366.

in the regard shown by the law for accused persons; for where the change is discretionary it is more frequently granted in favor of the defendant than in civil actions.[1]

The writer can only say, in conclusion, that he believes that in minor courts more changes of venue are provided for than are necessary for the proper administration of justice.

§ 39. Venue — Non-residents.— In regard to real actions against non-residents when the property is situated in the state, or when injury is done to real property, and the action is local, it will lie in the proper court of the county where the property in controversy is situated or the injury was done.[2] In such case the action must be brought as a proceeding *in rem* unless personal service is obtained in the state.[3]

In transitory actions the venue should generally be laid in the county where the defendant is found; but this rule is not universal. It may be regulated by statute. In actions in which attachments are issued, or other proceedings where the property of the defendant, who is a non-resident, is sequestrated, the proceeding should be brought where the property is seized.

The service of notice must be personal and made in the state, or there must be an appearance of the defendant, to ac-

[1] Abuse of discretion in denying a change of venue must be made to appear or the decision of the court will not be interfered with, even when the ground alleged is the prejudice of the judge. State v. Ray, 50 Iowa, 520; State v. Knight, 19 Iowa, 94; State v. Ingalls, 17 Iowa, 8; State v. Freeman, 27 Iowa, 333; State v. Mewherter, 46 Iowa, 88.

[2] Under the provisions of the Code of 1851, that an action relating to real property should be brought in the county where the property was situated, *held*, that an action of trespass *quare clausum fregit* was governed thereby. Barnes v. Davis, 2 Iowa, 160.

[3] Although a mortgage may be foreclosed in any county in which the court could acquire jurisdiction to render a personal judgment on the debt, yet, if the proceeding was upon publication only, and defendant did not appear, the foreclosure could not be had in a county where no portion of the property was situated. Iowa Loan & Trust Co. v. Day, 63 Iowa, 459. Under the provisions of the Code of 1851, *held*, that a bill in equity brought by the vendor to foreclose a title bond was a local action, and properly brought in the county where the land was situated. Johns v. Orcutt, 9 Iowa, 350. It seems that where no personal judgment can be rendered in an action of foreclosure, it is an action *in rem*, and the court acquires no jurisdiction of a proceeding brought in a wrong county. Orcutt v. Hanson, 71 Iowa, 514.

quire jurisdiction beyond the property seized. Judgments against defendants not personally served with process in the state, and their effect, will be considered under proceedings *in rem.*[1]

In criminal actions the venue is the same as against residents.

Before leaving this subject we desire to say a few words in reference to the rights of non-residents to sue non-residents in states other than that in which the cause of action arose. Article 4, section 2, of the constitution of the United States provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." And article 14, section 2, last clause, declares that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." We notice in Wells on Jurisdiction of Courts, page 31, the following: "When a non-resident plaintiff sues a foreign corporation, the jurisdiction cannot be maintained unless the cause of action or the subject of it arose or existed within the state, and the reason is quite obvious." The rule above referred to, where the action is transitory, is in direct violation of the constitution and directly against the decided weight of authority, and is unsupported by reason.[2] The courts of the United States and the states make no inquiry as to the residence of the plaintiff.

[1] The provisions of section 2859, Iowa Code, restrict attachments against residents. An attachment issued in a case brought in a county other than that specified is invalid, and should be dismissed on motion, even if the case itself is transferred, upon the application of the defendant, to the county of his residence. Wasson v. Millsap, 70 Iowa, 348.

[2] "Whenever, by either the common law, or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the circuit court of the United States for the northern district were competent to try such a case when the parties were properly before it. Mostyn v. Fabrigas, 1 Cowp. 161; Rafael v. Verelst, 2 W. Bl. 983, 1055; McKenna v. Fisk, 1 How. 241. We do not see how the

fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish that, in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases. See Ex parte Van Riper, 20 Wend. (N. Y.) 614; Lowry v. Inman, 46 N. Y. 119; Pickering v. Fisk, 6 Vt. 102; Railroad v. Sprayberry, 8 Bax. (Tenn.) 341; Great Western Railway Co. v. Miller, 19 Mich. 305; Dennick v. Railroad Co. 103 U. S. 18. Hyde, Adm'r, v. Wabash, St. Louis & Pacific R'y Co. 61 Iowa, 442 (Adams, J.): "At common law no action can be maintained for an injury resulting in death. Baker v. Bolton, 1 Camp. 493; Carey v. Berkshire R. R. Co. 1 Cush. 475; Palfrey v. Portland, Saco & Portsmouth R. R. Co. 4 Allen, 55. The injury in this case resulting in death, no action can be maintained for it unless by reason of a statute. So far, we presume, there is no controversy. The plaintiff does not aver that there is any statute of Missouri giving him a right of action, and we presume that he does not rely upon such statute. He shows, indeed, by his argument that he relies upon a statute of Iowa. The question presented, then, is as to whether the action can be maintained under the statute of Iowa. The statute which we understand the plaintiff to rely upon is section 2525 of the code, and is in these words: 'All causes of action shall survive, and may be brought notwithstanding the death of the person entitled to or liable for the same.' The plaintiff contends that the question as to whether an action survives pertains to the remedy, and must be governed by the law of the place of the court. He contends, therefore, that it is immaterial where the action arose; that, wherever it arose, the words of the statute are broad enough to cover it, and that, if the court had construed them according to their plain import, it would have been so held. But, in our opinion, there is a question involved deeper than one pertaining merely to the remedy. Where a cause of action does not survive, it is to be treated the same as if it never arose. The cause of action in this case arose, if anywhere, in Missouri; but, if it did not survive in Missouri, and if the courts of that state would treat it as if it never arose, we think it would be improper for the courts of this state to treat it as if it did. An act which, done in Missouri, does not create a liability in that state would not create a liability anywhere. Again, if the cause of action survives, it must survive to some person or persons. A cause of action which survives only by statute must survive to the person or persons designated by statute. Now suppose that, by a statute of Missouri, the cause of action in this case (as we understand the fact to be) survives to the intestate's wife, if he left one, and if not, to his minor child or children, or father and

mother, as the case may be. If such is the fact, it could not properly be held to have survived under the statute of Iowa to the personal representative. The company should not be subjected to more than one liability for the same act. Yet it is difficult to see how a recovery in Iowa would, under the supposition made, bar a recovery in Missouri. In some states the measure of liability is fixed; in others it is limited; in others still, as in this state, it is unlimited. This consideration alone would be a strong reason for allowing a recovery only in accordance with the law of the place of the injury. It is unnecessary to elaborate. That a right of recovery for such injury exists only by reason of the law of the place of the injury has been held in Whitford v. Panama R. R. Co. 23 N. Y. 465; State, for the use of Allen, v. Pittsburgh & Connellsville R. R. Co. 45 Md. 41; Hover v. Penn. R. R. Co. 25 Ohio St. 667." In Ellis v. Davis, 109 U. S. 497, it is said: "Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. It has often been decided by this court that the terms 'law' and 'equity,' as used in the constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the states, as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect or default of another (Railway Co. v. Whitton, 13 Wall. 270, 287; Dennick v. Railroad Co. 103 U. S. 11), but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law. Ex parte Boyd, 105 U. S. 647; Boom Co. v. Patterson, 98 U. S. 403. In Hyde v. Stone, 20 How. 170, 175, it was said by Mr. Justice Campbell, delivering the opinion, that 'the court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. See Flash v. Conn, 109 U. S. 379. The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is therefore clear." Dennick v. Railroad Co. 103 U. S. 11. It was observed by Waite, C. J., in The Harrisburg, 119 U. S. 204, that "it was held by this court, on full consideration, in Insurance Company v. Brame, 95 U. S. 756, 'that by the common law no civil action lies for an injury which results in death.' See, also, Dennick v. Railroad Co. 103 U. S. 11, 21. Such, also, is the judgment of the English courts where an action of the kind could not be maintained until Lord Campbell's Act, 9 and 10 Vict. ch. 93. It was so recited in that act, and so said by Lord

Blackburn in Seward v. The Vera Cruz, 10 App. Cas. 59, decided by the House of Lords in 1884. Many of the cases bearing on this question are cited in the opinion in Insurance Co. v. Brame. Others will be found referred to in an elaborate note to Carey v. Berkshire Railroad, 1 Cush. 475, in 48 Am. Dec. 616, 633. The only American cases in the common-law courts against the rule, to which our attention has been called, are Cross v. Guthery, 2 Root, 90; S. C. 1 Am. Dec. 61; Ford v. Monroe, 20 Wend. 210; James v. Christy, 18 Mo. 162, and Sullivan v. Union Pacific R. R. 3 Dillon, 334. Cross v. Guthery, a Connecticut case, was decided in 1794, and cannot be reconciled with Goodsell v. Hartford & New Haven R. R. 33 Conn. 55, where it is said: 'It is a singular fact that by the common law the greatest injury which one man can inflict on another — the taking of his life — is without a private remedy.' Ford v. Monroe, a New York case, was substantially overruled by the court of appeals of that state in Green v. Hudson River R. R. 2 Keyes, 294; and Sullivan v. Union Pacific R. R., decided in 1874 by the circuit court of the United States for the district of Nebraska, is directly in conflict with Insurance Co. v. Brame, decided here in 1878." Boyce v. Wabash R. R. Co. 63 Iowa, 71: "This brings us to a consideration of the merits of the plaintiff's appeal. The question to be determined we understand to be whether there can be a recovery under the statute of Illinois in the courts of this state. As there is a similar statute in this state, it can be properly said that the policy is the same in both states. If a recovery is allowed the public policy of this state will not be in any manner infringed. This is not an attempt to give extra-territorial force to a statute of this state, nor to recover under a statute thereof for the invasion of a right or the infliction of wrong, in some other state or country. This case is, therefore, distinguishable from Whitford v. Panama R. R. Co. 23 N. Y. 465; and Hyde v. Wabash R. R. Co. 61 Iowa, 441. If this cause of action existed at common law, we apprehend a suit could be maintained and a recovery had in this state. In Smith v. Bull, 17 Wend. 323, it was held that an action for assault and battery committed in Pennsylvania could be maintained in New York. It cannot be a subject of dispute that personal actions, whether based on contracts or torts, are, under the common law, transitory. In this and several other states there are statutes providing in substance, where a wrongful act causes death, that a right of action survives to the administrator or next of kin of the deceased. Under these statutes it has been determined in two recent and well-considered cases that an action may be maintained in one state, although the wrongful act which caused the death was committed in another state. Dennick v. Railroad, 103 U. S. 11; Leonard v. Columbia Steam Navigation Co. 84 N. Y. 48. These cases are based on the thought tersely expressed by Miller, J., in the case first cited, as follows: 'It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced, and the right of action pursued in any court which has jurisdiction of such

matters, and can obtain jurisdiction of the parties.' The rule adopted in these cases we deem to be correct, and we are content to follow them, without stating our reasons at length; for we could only repeat what has been so well said in the cases above cited." Vimont v. C. & N. W. R. R. Co. 69 Iowa, 298 (per Reed, J.): "It is alleged in the third paragraph of the answer that the assignment by Carr to plaintiff of the claim on which the action is brought was executed, delivered and accepted by plaintiff, and its acceptance took effect in the state of Illinois, and that by the common law, which is in force in that state, the assignment of said cause of action is void. The question raised by the demurrer to this paragraph is whether the plaintiff is precluded by these facts from recovering on the cause of action sued on. The assignment under which plaintiff claims is set out in the petition, and it is of a cause of action which is alleged to have arisen under the laws of this state in favor of an employee of defendant on account of a personal injury sustained by him in consequence of the negligence of a co-employee. . . . The contract of assignment of such claim between parties otherwise competent to contract is void at common law, then, not because of any incapacity of the parties to enter into the contract, but because the claim itself is not the subject of contract. Under the statute of Iowa, however, such claims are given a character entirely different from that sustained by them when arising under the common law. They are not merely personal claims in favor of the parties sustaining the injuries, and they do not terminate with their death, but become a part of their estates and descend to their representatives, and actions thereon may be maintained by their representatives. Code, secs. 2525–2527; Carson v. McFadden, 10 Iowa, 91; McKinlay v. McGregor, id. 111; Shafer v. Grimes, 23 id. 550. They are also assignable under the law of this state. Weire v. City of Davenport, 11 Iowa, 49; Gray v. McCallister, 50 id. 497. If Carr, plaintiff's assignor, had a valid claim for damages on account of the alleged injury, such claim had the qualities of a property right or interest. It constituted a part of his estate, and was capable of being transferred within the state by assignment, and at his death it would have descended to his representatives, and his assignee or representatives could have maintained an action in his own name for the enforcement."

CHAPTER VI.

PROCESS.

Of process and service — Seizure of property will not give jurisdiction without process — Judgment void unless process in some form is given . . . . . § 40
Notice, essential element of jurisdiction — Statutory rules of service must be strictly pursued — The law requiring process gives right to defend — Judgment void if right to defend is refused — Guardian *ad litem* cannot appear for minor not served — If minor appears by attorney, want of guardian *ad litem* does not affect jurisdiction . 41
Privileged from service — Who are exempt and when — Persons attending court under process exempt — Persons attending court under subpœna exempt — Foreign ministers exempt — Parties exempted must claim privilege 42
Service of process obtained by fraud void — Where defendant is enticed into the jurisdiction, process void — Where arrested to obtain service, void 43
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§ 40. Process and service.— When a legal proceeding is commenced against a person or corporation, whether resident

within the jurisdiction of the court in which it is begun or not, and whether the proceeding is *in rem* or *in personam*, the defendant must be served with process in some one of the forms provided by law, or a voluntary appearance must be made by or on his behalf. The notice, if there is no appearance, is jurisdictional.[1] Although much has been said by courts

[1] Harris v. Hardeman, 14 How. 339: "In reference to the first inquiry, it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfill. The court entering such judgment by default could have no jurisdiction over the person as to render such personal judgment, unless, by summons or other process, the person was legally before it. A court may be authorized to exert its powers in reference either to persons or things — may have jurisdiction either *in personam* or *in rem;* and the existence of that jurisdiction as well as the modes of its exercise may vary materially in reference to the subject-matter to which it attaches. Nay, they may be wholly inconsistent; or, at any rate, so much so as not to be blended or confounded. This distinction has been recognized in a variety of decisions, in which it has been settled that a judgment depending upon proceedings *in personam* can have no force as to one on whom there has been no service of process, actual or constructive; who has had no day in court, and no notice of any proceeding against him. That with respect to such a person such a judgment is absolutely void; he is no party to it, and can no more be regarded as a party than can any and every other member of the community. As amply sustaining these conclusions of law, as well as of reason and common sense, we refer to the following decisions: In Borden v. Fitch, 15 Johns. 141, Thompson, chief justice, says: 'To give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose. The cases in the English courts, and in those of our sister states, are very strong to show that judicial proceedings against a person not served with process to appear, and not being within the jurisdiction of the court, and not appearing in person or by attorney, are null and void. In Buchanan v. Rucker, 9 East, 192, the court of king's bench declared that the law would not raise an *assumpsit* upon a judgment obtained in the Island of Tobago by default, when it appeared upon the face of the proceedings that the defendant was not in the island when the suit was commenced, and that he had been summoned by nailing a copy of the declaration on the court-house door. The court said it would have made no difference in the case if the proceedings had been admitted to be valid in the Island of Tobago. In the supreme court of Massachusetts, Chief Justice Parsons, in Bissell v.

touching jurisdiction derived from the filing of a petition, seizure of property by attachment, garnishment or other means of sequestration, we hold that the rule to-day is that there must be service of process made on the defendant in some

Briggs, 9 Mass. 464, lays down the principles very clearly and distinctly that before the adoption of the constitution of the United States, and in reference to foreign judgments, it was competent to show that the court had no jurisdiction of the cause; and, if so, the judgment, if set up as a justification for any act, would be rejected without inquiring into its merits.'" After citing a number of cases, the learned judge proceeded to say: "We have refused to sustain an action here upon a judgment in another state, where the suit was commenced by attachment, and no personal summons or actual notice given to the defendant, he not being, at the time of the attachment, within the state. In such cases we have considered the proceedings *in rem*, and only binding the goods attached, and the judgment having no force *in personam*. This principle is not considered as growing out of anything peculiar to proceedings by attachment, but is founded on more enlarged and general principles. It is said by the court, 'that to bind a defendant personally by a judgment, when he was never personally summoned, nor had notice of the proceedings, would be contrary to the first principles of justice.' . . . In the case of Starbuck v. Murray, 5 Wend. 156, the supreme court of New York say: 'The courts of Connecticut, Pennsylvania, New Hampshire, New Jersey and Kentucky have also decided that the jurisdiction of the court rendering a judgment may be inquired into, when a suit is brought in the courts of another state on that judgment;' and after citing the cases of Thurber v. Blackbourne, 1 N. H. 242; Benton v. Bengot, 10 S. & R. 240; Aldrich v. Kinney, 4 Conn. 380; Curtis v. Gibbs, Penn. (N. J. L.) 405, they say: 'This doctrine does not depend merely upon adjudged cases; it has a better foundation; it rests upon a principle of natural justice. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence, without the privilege of showing, if he can, the claim against him to be unfounded.' The court then proceeded: 'But it is contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced, as to him, is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense, by a process of reasoning that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant —

form to give the court jurisdiction over the property seized; otherwise the judgment would be an arbitrary edict, condemning without hearing.[1]

the paper declared on is a record, because it says you appeared; and you appeared, because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped from proving any fact which goes to establish the truth of a plea alleging the want of jurisdiction.'" This doctrine was affirmed in Holbrook v. Murray, 5 Wend. 161. In Denning v. Corwin and Roberts, 11 Wend. 647, it was ruled: "That a judgment in partition, under the statute, where part of the premises belonged to owners unknown, was not valid, unless it appear upon the face of the record that the affidavit required by the statute, that the petitioner, or plaintiff in partition, is ignorant of the names, rights or titles of such owners, was duly presented to the court, and that the notice also required in such cases was duly published." Borden v. Fitch, 15 Johns. 121; Wilson v. Bank of Mt. Pleasant, 6 Leigh, 570; Wynn v. Wyat's Adm'x, 11 Leigh, 584; Hollingsworth v. Barbour, 4 Peters, 466; Woodruff v. Taylor, 20 Vt. 65. Where the statute requires service on a general agent, service on a special agent is insufficient. Great West Mining Co. v. Mining Co. 13 Am. St. Rep. 204; S. C. 12 Colo. 46; Furgeson v. Jones, 17 Ore. 204; Vogel v. Brown School T'p, 112 Ind. 317. Void judgments are not conclusive upon either party. Louisville, etc. R'y Co. v. Hubbard, 116 Ind. 193; Landon v. Townshend, 112 N. Y. 93; Flint River S. S. Co. v. Foster, 48 Am. Dec. 272–278.

[1] In Bradstreet v. Neptune Insurance Co. 3 Sumn. 607, Justice Story said: "It is a rule, founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determinate and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party,— *castigatque, auditque.* It may be binding upon the subjects of that particular nation; but, upon the eternal principles of justice, it ought to have no binding obligation upon the rights or property of the subjects of other nations, for it tramples under foot all the doctrines of international law and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding." Rankin v. Miller, 43 Iowa, 21: "On the 11th of September, 1865, H. presented

In every action there must be a party plaintiff and a party defendant, and there must be a controversy upon which an issue can be formed. The very purpose of the court is to determine that issue or the issues. The court must have a plaintiff invoking relief against some defendant. That defendant must be brought before the court, either by personal service or "excuse," as it is sometimes called, and, as more properly called, by publication, posting notices, and the like. This rule is established because the law presumes that every person will put his property in charge of some one or give it his personal attention, and will receive the notice, or obtain knowledge that the property has been seized. Besides, the owner is presumed to know the law of the place where he has property, and also to know whether he is in debt or not, whether any one claims the property; and due care requires him to so provide for it that he will be able to gain notice of it if it is molested, seized or interfered with.

§ 41. Notice.—Therefore the rule is that every one must "have his day in court" or an opportunity to know of the proceedings against him; and a sentence obtained in defiance of the maxim *audi alteram partem* deserves not the name of a judgment.[1] Without notice one essential element of jurisdic-

a petition to the county court showing that plaintiff was the owner of the lands therein described, being a part of those in controversy in this suit, and asking that he be appointed plaintiff's guardian. In the same petition he asks for the sale of the lands. He was duly appointed guardian. The court ordered that he give notice of the application to sell the lands by publication in a newspaper. It appears that the notice ordered was given. No notice of any kind was served or attempted to be served upon plaintiff, and the court made no finding of such a fact. The sale was ordered in pursuance of the application and the lands accordingly sold. The law in force at the time (R. S. sec. 2553) required, in proceedings for the sale of the lands of minors by their guardian, that notice of the application therefor should be served upon the ward at least ten days prior to the day of hearing. The notice required in this section was necessary to give the court jurisdiction. In the absence of proof of notice or a finding of the court that notice had been given, the proceedings are void. It is not a case of insufficient or defective notice, as in Shawhan v. Loffer, 24 Iowa, 217, and other decisions of this court, but one in which there is no pretense of service of notice as required by law. Defendants, therefore, acquired no title under these void proceedings. Good v. Norley, 28 Iowa, 188; Washburn v. Carmichael, 32 Iowa, 475; Lyon v. Vanatta, 35 Iowa, 521."

[1] Railroad Co. v. National Bank, 102 U. S. 21: "The judgment in the state court clearly constitutes no bar

tion is absent — the party defendant. The very jurisdiction is to "hear" as well as to "try and determine" the action. "To hear" implies that some one is before the court to speak; "to determine" involves the possibility of forming an issue to determine.

Where the statute prescribes the form of service, or mode of obtaining it, that mode must be pursued strictly.[1] The law

to the present action. Personal judgments bind only parties and their privies. The railroad company was in no sense a party to the separate action against Palmer & Co., nor did it receive notice from the latter of the pendency of that suit. It was, therefore, in no manner affected by the judgment. Had the company received such notice in time, it would, perhaps, although not technically a party to the record, have been estopped, at least as between it and its accommodation indorsers, from saying that the latter were not bound to pay the judgment, if obtained without fraud or collusion. Being, however, an entire stranger to the record, it had no opportunity or right in that proceeding to controvert the claim of the bank, to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. If, in the action against Palmer & Co., the bank had obtained judgment for the full amount of the note, and, being unable to collect it, had sued the railroad company, the latter would not have been precluded by the judgment in that action, to which it was not a party, and of the pendency of which it had not been notified, from asserting any defense it might have against the note. This being so, it results that the company cannot plead the judgment in the state court as a bar to this action. An estoppel, arising out of the judgment of a court of competent jurisdiction, is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of the parties, as his interest may happen to require." Hale v. Finch, 104 U. S. 265: "And it is scarcely necessary to say that that judgment is not conclusive of the rights of the present defendant. He was not a party to that action, nor notified of its pendency. He had no opportunity or right, in that case, to controvert the clain of the Oregon Steam Navigation Co., to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. Railroad Co. v. National Bank, 102 U. S. 14. Besides, that case was founded upon the written covenant and agreement of Winsor and his associates with the Oregon Steam Navigation Co., while the liability of Finch to the plaintiffs in this action depends altogether upon the construction which may be given to the bill of sale executed to him by Hale. If the record of the case of the Oregon Steam Navigation Co. v. Winsor, etc., is competent evidence in this action for any purpose, it can only be to show the amount of damages which Winsor and his associates have sustained by reason of the New World being run on the waters of California after Finch became owner."

[1] Wade on Law of Notice, sec. 1160: "It has been asserted by some of the authorities that not all the requisites to perfect process are indispensable

requiring process to be served also gives the implied right to the defendant to appear and defend; and if this right is refused him the judgment is void. The judgment is based on the service as much as subject-matter. The petition simply says: I have a cause of action against the defendant. The law says: Notify the defendant of the proceedings and the court will hear you. Hence the notice must be given under the forms of law. Where it provides a form, or gives direction as to the manner of service by publication, the statute must be complied with strictly; the direction is mandatory.[1]

to the support of the jurisdiction thereby sought to be acquired over the person of the defendant. The omission of some things regarded as necessary to the protection of a judgment against a direct proceeding to set the same aside have been held not to justify a collateral attack upon a judgment once obtained. Pursley v. Hayes, 22 Iowa, 11; Westoby v. Day, 22 Eng. L. & Eq. 261. But see Pollard v. Wegener, 13 Wis. 569. Such defects are those which relate rather to the regularity of the process by which jurisdiction is obtained, than to the question whether any process has been issued and served. It is the difference between defective process and no process. Where the process is merely defective, it is held that it may be sufficient to give the court jurisdiction of the person of the defendant, when it may try all the issues between the parties, and may determine the question of the sufficiency of the process upon which its jurisdiction depends, as one of those issues. Should the case go to judgment, it will be presumed that the court has decided the process to be sufficient, and its judgment can only be affected by a direct proceeding for the purpose of setting the same aside, or by seeking the reversal thereof in a court of appellate jurisdiction. Sm. Lead. Cas. 697, 700; Borden v. State, 11 Ark. 519; Sheldon v. Wright, 5 N. Y. 497; Wright v. Marsh, 2 G. Greene, 109; Ewing v. Higby, 7 Ohio, 198; Paine v. Mooreland, 15 Ohio, 435; Morrow v. Weed, 4 Iowa, 77; Shawhan v. Loffer, 24 Iowa, 217; Myers v. Overton, 4 E. D. Smith (N. Y.), 428."

[1] Wade on Law of Notice, sec. 1161: "'Jurisdiction,' it has been said, 'consists not in the declaration of right, but in the right to declare it, and in declaring it rightly; and therefore presupposes that proper efforts have been made to bring those parties into court who are to be affected by its exercise.' Ex parte Kinning v. Buchanan, 8 C. B. 271; 1 Sm. Lead. Cas. 839. Just what are proper efforts to bring those parties into court who are to be affected by the exercise of its right to declare is beset with some difficulty, in view of the distinction between mere irregularities and fatal defects in the process. Though process regarded as defective, and liable to be quashed, has been declared sufficient to protect the judgment from collateral attack (Morrow v. Weed, 4 Iowa, 77; Shawhan v. Loffer, *supra;* Fagg v. Clements, 16 Cal. 389), still it cannot be maintained that a mere attempt or pretense at the issuance and service of process would be sufficient to give the court even the temporary

Where the statute directs service on minors, the service cannot be dispensed with, and a guardian *ad litem* cannot enter an appearance which will bind the defendant if the statute is not observed.[1] If, however, an infant is served and appears

jurisdiction necessary to pass upon the sufficiency of the process. Were the rule otherwise, there could be no such thing as a void judgment, fair on its face. There must be a point of departure from the legal requirements in this respect where the pretended process would be held no process at all; otherwise the more complete the fraud in making a show of service of process, the better would be the prospect of success. Many of the defects which utterly vitiate the process, as well as those characterized in some of the cases as mere irregularities, occur with respect to the service and return of process, and will be illustrated by cases cited in subsequent parts of this chapter devoted to the return. From a careful consideration of these cases, as well as those already cited, conflicting as some of them will be found, we may safely deduce the rule that where a departure from the requirements of the law in regard to the issuance or service of process in any substantial matter affects the rights of the defendants, the process will be a nullity, and the judgment may be collaterally attacked. What are matters of substance and what matters of mere form can best be shown by further reference to the authorities. Where a party defendant upon whom process has been defectively served, or who has been served with process irregularly issued, or even where he has been served with no process at all, appears to the action and answers, demurs generally, asks or consents to a continuance, his appearance will amount to a complete waiver of process. Briggs v. Sneghan, 45 Ind. 14; Peters v. St. Louis, etc. R. R. Co. 59 Mo. 406; Reading v. Ford, 1 Bibb, 338; Ryan v. Driscoll, 83 Ill. 415; Bills v. Stanton, 69 Ill. 51; Hohmann v. Eiterman, 83 Ill. 92; Randall v. Falkner, 41 Cal. 242. But a special appearance for the purpose of objecting to irregularities in, or failure of, process cannot be construed into a waiver of the irregularities complained of. Muller v. Higgins, 13 Abb. Pr. (N. S.) 297; Jones v. Byrd, 74 Ill. 115."

[1] Hawes on Jurisdiction, section 231: "Many courts hold that an infant must be served the same as if an adult, and the fact that a guardian *ad litem* has been appointed does not render a decree valid, or give jurisdiction in the first instance, and such guardian cannot waive this process. Service on the guardian of a lunatic is held sufficient, and actual service on the lunatic not necessary." The author cites Newby v. Vestal, 6 Ind. 412; Nelson v. Moon, 3 McLean, 319; McIntosh v. Atkinson, 63 Ala. 241; Hough v. Doyle, 8 Blackf. 300; Hough v. Canby, 8 Blackf. 301; Moore v. Starks, 1 Ohio St. 371. But see McAnear v. Epperson, 54 Tex. 225; Stearns v. Wallace, 58 N. H. 228; Robbins v. Robbins, 2 Ind. 74; Cates v. Woodson, 2 Dana, 452. Johnston v. S. F. Sav. Union, 63 Cal. 563: "The infants were not both defendants and intervenors. If they were defendants they were not barred, because they had not been served with summons. If intervenors, the decree does not bar them by its terms. It will not do to say that the mere name given them in different portions of the roll

by attorney, and not by guardian *ad litem*, it does not affect the jurisdiction. If no appointment of guardian *ad litem* is made for infant heirs, this is not jurisdictional.[1]

is entirely immaterial. The court was dealing with the rights of infants, over whom it could acquire jurisdiction only after strict compliance with the statute." Ins. Co. v. Bangs, 103 U. S. 435. Wade on Notice, section 1316: "Service may be had upon minors, the same as upon adult parties, except where the statute lays down a different rule of practice. But a minor will not be bound by a written acknowledgment of service, whether such writing is executed by himself or his guardian, or both." Kansas City & C. R. R. Co. v. Campbell, 62 Mo. 585; Davis v. Duffie, 1 Abb. App. Dec. 486.

[1] Hoover v. Kinsey Plow Co. 55 Iowa, 670: "The court had not of course acquired jurisdiction of the person in such sense as to give it the power to render a personal judgment. The service of notice was only by publication, but that was sufficient service to sustain the attachment. That the court had jurisdiction to appoint a guardian *ad litem* no one would dispute. The appointment of a guardian *ad litem*, then, is not a jurisdictional fact, and a failure to appoint is merely an irregularity or error." Drake v. Hanshaw, 47 Iowa, 292: "The defense of a minor must be by his regular guardian, or by a guardian appointed to defend him, where no regular guardian appears. No judgment can be rendered against a minor until after a defense by a guardian. (Code, § 2566.) In this case a judgment was rendered, and there was no defense by a guardian. It is claimed, therefore, by the appellant, that the judgment is void. The court, however, had jurisdiction of the person of the defendant, and of the subject-matter of the action, and we think that the failure to appoint a guardian *ad litem* was a mere irregularity, and that the judgment must be regarded as in force until set aside. Bloom v. Burdick, 1 Hill, 130; Barber v. Graves, 18 Vt. 290; Porter v. Robinson, 3 A. K. Marsh. 253; White v. Albertson, 3 Dev. 241; Timmons v. Timmons, 6 Ind. 8; Randalls v. Wilson, 24 Mo. 76. The rendition of a judgment without a defense by a guardian was doubtless erroneous. Knapp v. Crosby, 1 Mass. 479; Miles v. Boyden, 3 Pick. 213; Starbird v. Moore, 21 Vt. 529. But did the circuit court have jurisdiction to enjoin the enforcement of the judgment or enter a decree setting it aside? We are of the opinion that it did not. The plaintiff had an adequate remedy at law. In Tyler on Infancy and Coverture, page 205, the author says: 'If an infant appear in person or by attorney it is error in fact, and may be assigned in the court in which the judgment is pronounced.' He cites Castledine v. Mundy, 1 Nev. & Man. 635; 4 Barn. & Ad. 90; Meredith v. Sanders, 2 Bibb, 101. Had the judgment been void the injunction might have been granted, but, as we have seen, it is not void. Nor was it voidable by the mere act of the judgment defendant. 'A judicial proceeding or matter of record can be avoided on account of infancy only by matter of record.' Tyler on Infancy and Coverture, p. 70. But a judgment against an infant, where no defense had been made by a guardian, may be reversed by writ of error. Swan v. Horton, 14 Gray, 179." Wickersham v. Timmons, 49 Iowa, 267: "The defendant at the

§ 42. Exemption or privilege from service — Who are exempted and when. — When a person is in attendance on a court under subpœna or process, he cannot, in many jurisdictions, be served with civil process.[1] So when a non-resident

time of the trial was a minor. No guardian *ad litem* was appointed until after the trial had commenced and several witnesses had been examined, and the plaintiff had rested. The court then appointed B., one of the defendant's counsel. After accepting the appointment, B. stated that he did not deem it his duty to adopt the trial thus far, and requested a reasonabble time to consult with his ward and prepare a defense. The court denied the request, directed the trial to proceed immediately, and the guardian *ad litem* proceeded under protest. The defendant reserved an exception to the action of the court in this respect, and now assigns the same as error. He relies upon a provision found in section 2566 of the code, which is in these words: 'The defense of a minor must be by his regular guardian, or by a guardian appointed to defend him where no regular guardian appears.' The defendant contends that this provision is not complied with where a part of the defense is conducted without a guardian. . . . In the case at bar it is not claimed, nor was it claimed in the court below, that other counsel were needed. It was suggested that other counsel might be employed. But this was not sufficient. If the court knew, as we may presume it did, that the counsel already employed and engaged in the defense, and who was appointed guardian *ad litem*, was an able and experienced lawyer, and abundantly qualified in every respect to conduct the defense, it was justified in disregarding the suggestion that other counsel might be employed. We can conceive of no advantage in this case which could have accrued to the defendant if the guardian *ad litem* had been appointed before instead of after the commencement of the trial. If Mr. B., by reason of his appointment, considered himself charged with greater responsibility, or was stimulated to greater effort, he still had an opportunity to supply any omissions. While, therefore, the practice of neglecting the appointment of a guardian *ad litem* until after the commencement of the trial is not to be encouraged, it appears to us that the failure to do so under circumstances which preclude the supposition of prejudice does not necessarily vitiate the verdict, even where the guardian *ad litem* objects to proceeding and proceeds only under protest."

[1] Dungan v. Miller, 37 N. J. L. 183 (Depue, J.): "Dungan was one of several defendants in a suit in chancery. He resides in the state of Pennsylvania, and on the 28th of February last came to Camden, in this state, for the purpose of being examined before a master as a witness in the case on the part of the defendants. After his examination was concluded, while on his way to the ferry to return home, the summons in this action was served. A party to a suit while necessarily going to, staying at or returning from court is privileged from the service of a summons or *capias* in a civil cause. Halsey v. Stewart, 1 South. 366. The place at which the party attends is not material. The privilege extends to attendance before any tribunal or officer before whom proceedings necessary in the trial or hearing of the cause

comes into a state to defend his suit he is usually exempt from service of process.[1] This applies to the going into the state

are had, as before an arbitrator appointed by rule of court, a master in chancery, or on the execution of a writ of inquiry. 2 Taylor on Ev. sec. 1202. It was insisted that the examination of witnesses on the part of the defendants having been closed, except as to the examination of this defendant, and no other proceedings being had before the master on that day, the privilege of the defendant was not that of a party, but merely as a witness, and that therefore process of subpœna was necessary for his protection. In Rogers v. Bullock, 2 Penn. 516, it was held, on the language of the statute, that subpœna served was necessary to secure the privilege of a witness from arrest during his attendance in court. Elsewhere it has been decided, and I think on better reason, that on a voluntary attendance, in good faith, by a witness without subpœna, the witness is privileged. Walpole v. Alexander, 3 Doug. 45; 1 Greenleaf on Ev. sec. 36. Especially so where the witness resides in another state and is under no legal compulsion to obey the process of courts in this state. But it would be an idle ceremony for a party to sue out process of subpœna for himself to give testimony in his own behalf. His attendance for that purpose is an attendance as a party in a proceeding connected with the trial of the cause, and as such he is exempt from service of summons."

[1] Matthews v. Tufts, 87 N. Y. 570 (Rapallo, J.): "In Van Lieuw v. Johnson, decided March, 1871, and referred to in Person v. Grier, 66 N. Y. 124, a majority of this court were of opinion that a summons could not be served upon a defendant, a non-resident of the state, while attending a court in this state as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority. Cole v. Hawkins, Andr. 275; S. C. 2 Str. 1094; Arding v. Flower, 8 T. R. 534; Miles v. McCullough, 1 Binn. 77; Hayes v. Shields, 2 Yeates, 222; Parker v. Hotchkiss, 1 Wall. Jr. 269; Juneau Bank v. McSpedan, 5 Biss. 64; Halsey v. Stewart, 1 South. (N. J.) 366; Miller v. Dungan, 8 Vr. (N. J.) 182; In re Healey, 53 Vt. 694. This exemption from service of civil process has been frequently accorded to creditors attending proceedings in bankruptcy (Ex parte List, 2 Ves. & B. 373; Ex parte King, 7 Ves. Jr. 312), and to a creditor who attended before the commissioners to propose himself as assignee and watch the proceedings. Selby v. Hills, 8 Bing. 166. Commissioners in bankruptcy are a court of justice sufficient for the purpose of having their witnesses protected by the court of chancery, at least, if not by themselves. They sit in the nature of a court in the administration of justice. Arding v. Flower, 8 T. R. 534. In proceedings in bankruptcy the due administration of justice requires that all the creditors should be free to attend, without interference by service of process of any kind. The moving affidavit showed that the defendant came from Boston, where he resides, to New York, and attended the meeting of creditors at the office of the register in bankruptcy, solely as a creditor and witness, to prove certain debts and claims against the estate of

and continues for a reasonable time to return. Judges and officers of the court are sometimes exempted.[1] Foreign min-

the bankrupt, and to participate in the choice of an assignee, and for no other purpose; that, while so attending, and while the meeting was being held, or immediately thereafter, before he had time to complete his business as such creditor and witness at such meeting and leave the office, the summons was served upon him. It appears that the defendant did at said meeting present proof of claims amounting to upwards of $386,000 in his own behalf, and also presented proof of claims of other creditors as their attorney in fact, and voted for the assignee both individually and as attorney for the other creditors whom he represented, and that the proofs of debt had been prepared and verified in Massachusetts. The plaintiff claims that the defendant was not attending as a witness, but only as a creditor, and also, on the hearing of the motion, read affidavits denying the validity of his claims as a creditor. These claims could not be tried on the motion to set aside the service, and, conceding that the defendant was in attendance only as a party, and as attorney of the other parties, we think that he was privileged from service of process or summons while so attending."

[1] Halsey v. Stewart, 1 South. (N. J. L.) 367 (Southard, J.): In this case "there is no difference of opinion upon the bench. The facts agreed show that the defendant Stewart, a resident of New York, attended the court of common pleas in the county of Essex, in the necessary prosecution of a suit in which he was a party in that county; that immediately after the decision of his cause he left the court-room, and while descending the steps from the house the sheriff read the summons to him; that the defendant then went directly to the office of his counsel to consult with him, whither in a few moments the sheriff followed, and there delivered to him a copy of the summons. This court, out of which the writ issued, is now moved to discharge the defendant altogether on the ground that he was privileged from such service. The plaintiff, on the contrary, contends that, there having been no arrest, and the summons not having been served in the presence of the court, he cannot be entitled to the privilege he claims. There is nothing unusual in this case, either in the time, place or manner of serving the process, to distinguish it from other cases; and if the defendant be discharged it must be upon the ground that a party to a suit, while necessarily going to, staying at or returning from the court, is equally privileged from the service of a summons as of a *capias*. The court believe that such is his privilege. . . In Cole v. Hawkins, 2 Str. 1094, it is said that the privilege now under consideration was designed to prevent any interruption of the business of the court, and the mere service of a copy of a bill of Middlesex in the presence of the court was declared a contempt. And in Hurst's Case, 4 Dall. 387, where the defendant had been called to the court as a witness, and was taken in execution while at his lodgings, Justice Washington declared that he was entitled to the privilege; 'that an arrest there has all the effects which could be produced by an arrest in the streets while coming to or going from the court.' Neither of these cases justify the idea that the interruption of the court must arise

isters and their servants are exempted from process by United States statutes applying to all courts.[1] Members of legislatures are exempted from service of process in some states; but the parties so exempted must appear and claim the privilege.[2] The reason of this rule is obvious, as the court would not know of this privilege but for its attention being called to it.

§ **43. Service obtained by fraud.**— Where the service of process is obtained by fraud, as by enticing the defendant within the jurisdiction, it is not good and may be set aside if the plaintiff caused it to be done or was a party to the fraud.[3]

from noise, disturbance or confusion created by the service in its presence by the insult thus offered to it; the one not being in its presence, the other being a mere handing of a paper from the officer to the defendant. The business of the court may be interrupted by the service elsewhere as well as in the room where it is sitting."

[1] R. S. U. S. sec. 4063: "Whenever any writ or process is sued out or prosecuted by any person in any court of the United States or of a state, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the president, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void." See United States v. Benner, Bald. 234; United States v. Lafontaine, 4 Cr. C. C. 173; Ex parte Cabrera, 1 Wash. C. C. 232.

[2] So members of the legislature in some states are entitled to the privilege of exemption. King v. Coit, 4 Day, 129; Tillinghast v. Carr, 4 McCord, 152. The party claiming such privilege should appear and promptly move the court to set aside the service when made and claim the exemption. Pollard v. Union Pac. R'y Co. 7 Abb. Pr. (N. S.) 70; *post*, n. 1, p. 128.

[3] Dunlap & Co. v. Cody, 31 Iowa, 260 (Day, C. J.): "I. Do the means used to obtain jurisdiction of the person of defendant, in the courts of Illinois, amount to fraud? It would seem that this question scarcely needs discussion. Fraud consists in the *suggestio falsi* or the *suppressio veri*. Both exist here. The false statement was made to defendant by plaintiff's attorney that H. and others were about to erect an elevator in Hancock county, Illinois, to cost between $30,000 and $40,000; and the defendant, being a carpenter, was induced to go to Illinois to look at the site of the proposed structure. The truth — that the object in getting defendant into the state of Illinois was to obtain jurisdiction of his person in an action against him, and avoid the bar of the statute of limitations of the state of Iowa — was suppressed. It cannot be supposed that if the real facts and purpose had been made known to defendant he would voluntarily have gone to Illinois and subjected himself to an action upon this demand, long since barred by the statute of limitations of the state in which he resides. Counsel representing plaintiff in this court, and

If one by means of fraudulent correspondence, telegrams or other false inducements is enticed within the jurisdiction by the plaintiff, the service will be set aside. If the plaintiff

who, it is but justice to say, were not concerned in obtaining the judgment in Illinois, do not seriously controvert the position that the mode of obtaining jurisdiction was fraudulent. They concede that it smells somewhat of fraud. The only palliation which they are able to offer is the suggestion of a doubt whether it may not be considered a 'pious fraud' in which 'the end justifies the means.' We do not think that it is entitled to even that small measure of charity. An enlightened and just administration of the law, no less than sound public morals, condemns such practices and demands that the client whose cupidity could sanction, and the attorney whose venality could execute, such a purpose, should alike be disgraced. II. Does the fact that the jurisdiction of the person of the defendant was obtained by fraud constitute a defense to an action upon this judgment? It is the recognized law of this state that when jurisdiction is properly acquired, fraud in the obtaining of a foreign judgment is a good defense to an action thereon. Rogers v. Gwinn, 21 Iowa, 58, and cases cited. If, then, fraud may be shown to defeat a recovery upon a foreign judgment, when the jurisdiction is undisputed, why should not fraud in obtaining the jurisdiction be followed by like consequences? It is a familiar doctrine in this state that one sued upon a foreign judgment may show that he was not, in fact, served with process, and that the court had no jurisdiction of his person. Pollard v. Baldwin, 22 Iowa, 328, and cases cited. It is also now the settled doctrine, both in the federal and state courts, that one sued upon the judgment of a sister state may successfully defend by showing that the attorney who entered an appearance for him had no authority to do so. Harshey v. Blackmarr, 20 Iowa, 172, and cases cited. Yet this is simply a recognition of the doctrine that, in an action upon a foreign judgment, the defendant may show that the jurisdiction was wrongfully obtained. . . . A reference to a few adjudged cases will show the extreme jealousy with which courts have ever guarded their process, and how uniformly they have recognized the doctrine that no legal right can be founded upon an act of fraud or oppression. In the case of Wells v. Gurney, 8 Barnw. & Cress. 769; S. C. 15 E. C. L. 336, the defendant, by the contrivance of plaintiff's attorney, was arrested on Sunday on a criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody until Monday and then arrested on civil process. The court ordered him to be discharged. In the case of Luttin v. Benin, 11 Mod. 50, Holt, C. J., said: 'If a man is wrongfully brought into a jurisdiction and there lawfully arrested, yet he ought to be discharged, for no lawful thing, founded on an unlawful act, can be supported.' In Ilsley v. Nichols, 12 Pick. 270, Shaw, C. J., said: 'There are many cases where arrests on civil process are held to be unlawful and void in consequence of the unlawful means used to place the party in a situation to be arrested, or where he has been unlawfully detained until he could be lawfully arrested, or other unlawful means used to obtain the custody of his person.' In the

causes the defendant to be arrested, and brought within the jurisdiction, it is a fraud; so if an arrest is made so as to detain a person in order to serve process on him. The plaintiff must

case of Barlow v. Hall, 2 Ans. 461, a party was confined without writ until a writ could be obtained, and then arrested upon it. The court said: 'The defendant has been seized illegally; that illegal confinement has been continued under our process. He must be discharged.' In Loveridge v. Plaistow, 2 H. Black. 29, a *capias* was made returnable on Sunday, to wit: in three weeks of Easter, April 29. At 8 o'clock on Monday morning, April 30, the defendant was arrested and detained by the officer till 10 o'clock, at which time the plaintiff obtained a renewal of the writ. The defendant was ordered to be discharged. In the case of Birch v. Prodger, 1 B. & P. N. R. 135, one P. was seized and detained by force without writ until an officer with a writ could be sent for. Being arrested upon such writ by the officer he was held entitled to his discharge. In Lyford v. Tyrrell, 1 Ans. 85, the defendant came to the plaintiff's house on Sunday, where he was detained by plaintiff till Monday and then arrested on a debt of £500. In answer to a motion for his discharge the plaintiff showed that at the time of his arrest on Monday, upon conditions which plaintiff had performed, the defendant agreed to waive every benefit of the forcible detention. The court said: 'We cannot distinguish this from an arrest on Sunday, which is purely void, and no subsequent consent of the defendant can make it good.' And when one is unlawfully arrested, and afterward, before he can get his discharge, he is arrested upon another writ, he is entitled to be discharged from the latter arrest, because made only through the medium of the former.' Ex parte Wilson, 1 Atk. 152. Referring to these authorities, Shaw, C. J., in the case cited *supra*, said: 'These cases, therefore, seem to establish the general principle that a valid and lawful act cannot be accomplished by any unlawful means, and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights.' See, also, Kennedy v. Daly, 1 Scho. & Lef. 355; Pomroy & Co. v. Parmlee, 9 Iowa, 140. Now, in view of these authorities, we apprehend it would be admitted that if the plaintiff had seized the defendant and carried him by force to Illinois and there caused him to be served with a summons, the jurisdiction thereby acquired would be wrongful. Yet the only difference between the case supposed and the one under consideration is that in that case the volition would be overcome by physical force, while in this the will was rendered passive by false and fraudulent suggestions. Had the truth been known to the defendant he would have been just as unwilling to have gone to Illinois in one case as the other, and we are unable to perceive why the case should not be followed by similar consequences. It is claimed that the defendant should have appeared in pursuance of the summons, and there moved the court to dismiss the proceedings in consequence of the fraud. It may well be doubted whether such appearance, even for the purpose of objecting to the service, would not have placed him within the jurisdiction of the

be shown to have been connected with the fraud, trick or artifice to render the service fraudulent.[1] The service of process on a witness in a court-room has been held a contempt of the court. The court will not allow its process to be used deceitfully or fraudulently.[2]

§ 44. Personal service of process and the return.— Inasmuch as courts having jurisdiction over the subject-matter obtain jurisdiction over the parties by the plaintiff appearing

court for all purposes connected with the trial. Such, certainly, would be the effect of such appearance in this state. R. S. sec. 2840. But conceding that he would not be visited with such consequences in the courts of Illinois, and that there the defendant might be relieved from the effects of an insufficient service, such relief in this case could be predicated only upon the fraud of plaintiff in procuring the service. Why drive a defendant to the necessity of traveling, it may be, a thousand miles to put in an appearance at court and suggest to the court that it has no jurisdiction in consequence of the fraudulent act of plaintiff in procuring service? Under such a construction it would, in many cases, cost more to make defense than to allow judgment to be taken and permit the fraud to triumph."

[1] See above. Wanzer v. Bright, 52 Ill. 41; Duringer v. Moschino, 93 Ind. 495.

[2] Dungan v. Miller, 37 N. J. L. 183; Blair v. Turtle & Bull, 1 McCrary, 378: "The plea thus interposed by the defendants may, at least for all practical purposes, be regarded and treated as a motion to quash the service of process and return to the writ. This special plea states, in substance, that at the time the suit was commenced, and when the summons was served upon the defendants, they were resident citizens of the state of Illinois, and did not at that time come voluntarily within the jurisdiction of the said court, nor within the state of Nebraska, but that they were brought from the state of Illinois into the state of Nebraska by force to answer to an indictment for a felonious offense said to have been committed in the last-named state. . . . We see, then, that the defendants were forced within the jurisdiction of the court where the suit was brought to answer to an indictment which had been procured against them mainly by the efforts of the plaintiff, for the purpose of forcing their attendance at court so that the summons issued in this case might be served on them, thus subjecting them to the jurisdiction of the court when it could have been acquired in no other way. Such a proceeding ought not to be sanctioned by any court. No authority has been cited where such proceedings have been upheld by any of the courts in this country for many years past. Reason, fair dealing and common honesty all unite in overturning such a practice. And were it otherwise it is believed that the principle involved is too well settled by many well-considered adjudicated cases to be seriously questioned at this late day. See Lagrave's Case, 14 Abb. Pr. (N. S.) note, 336, 344; Ransted v. Otis, 52 Ill. 30; Williams v. Reed, 29 N. J. Law, 385; Juneau Bank v. McSpedan, 5 Biss. 64; Dungan v. Miller, 37 N. J. L. 182."

and invoking their aid, and over the defendant by his being brought before them, either by voluntary appearance or by process served, and generally by process, it is proper for us to speak of such service and the return made to it. Every proceeding in a court of law is adversary in its character. It matters not whether it is *in personam* or *in rem*. The plaintiff undertakes to bring the defendant before the court by giving him legal notice of the pendency of the action. This notice which he is required to give and which he undertakes to give is jurisdictional.[1]

[1] Wade on the Law of Notice, secs. 1135–1138: "Whatever be the wording or the technical name of the instrument by which a person is advised of the pendency of a civil suit against him, whether it be mandatory in its terms to the officer charged with its service, bidding him to summon the party to be and appear, etc., or is couched in language merely suitable for the conveyance of information to the defendant, advising him that unless he appear, etc., judgment will be taken against him, it is still, in effect, a notice, and nothing more, though it may be styled a writ. It no longer serves the purpose of the ancient original writ further than to inform the defendant of the pendency of the action and afford him an opportunity to appear and defend. In some of the states the original process by which the court obtains jurisdiction of the defendant is no longer styled a writ of summons, but is called simply a notice. Code of Iowa 1873, sec. 2599, p. 441. And where this change has been adopted the notice is found to subserve all the purposes for which a writ will be found necessary, when it is not desired to place the defendant under personal restraint. This process, being first in order, is also of primary importance in the institution of a suit either at law or in equity; for its due service, actually or constructively, is necessary to give the court jurisdiction either of the *defendant*, in personal actions, or of the *thing*, in actions *in rem*. The Globe, 2 Blatch. Ct. Ct. 427; Pagett v. Curtis, 15 La. Ann. 451; Pomeroy v. Betts, 31 Mo. 419; Kehler v. Jack Manuf. Co. 55 Ga. 639. Where the object of the action is to obtain a judgment against the defendant upon which an execution may issue to be levied generally of his goods and chattels, or of his property, personal, real, and mixed, it is necessary at common law that there should be a personal notice, citation, summons or subpœna, or that the defendant should voluntarily appear to the action. In cases of this character such notice or appearance is indispensable to the jurisdiction of the court. Gray v. Hawes, 8 Cal. 562; Cooper v. Smith, 25 Iowa, 269; Wilson v. Johnson, 30 Texas, 499. This is true of every proceeding of a judicial nature to which there are two or more parties, except where there are statutory provisions authorizing process other than personal. All the parties are entitled to a hearing before judgment can be legally pronounced against them. Of this they could have no assurance if they were not notified of the pendency of the proceedings against them. Without such notice, then, as is imparted by the original process

Courts of law are not *ex parte* tribunals, but are created by the state to hear all parties interested in the controversy; hence the law requires process or notice, and contemplates that there shall be proof of the proper service thereof, so the court may know that the forms of the law have been complied with. Process originally was a writ that issued from the court, under its seal, and was formal and technical. It is now known as a notice and in many states is issued by the plaintiff's attorney, and is sufficient if it imparts knowledge to the defendant, and all if more than one, that an action has been commenced in a court, naming it, by the plaintiff against him, and that he must appear on or before a certain time named, at a certain place and term named, and defend the cause of action therein named. Less formality than formerly is required, but the merits are the same.

§ 45. Personal service and excuse for service.— When the statute provides that service of notice shall be made, or notice is required, personal service is meant and no other service will be sufficient.[1] When service of the notice or process is made

issuing out of a court or other judicial tribunal, any judgment rendered against one or more of the parties would not only be erroneous, but in general absolutely void. Judah v. Stephenson, 10 Iowa, 493; Madden v. Fielding, 19 La. Ann. 505; Mitchell v. Gray, 18 Ind. 123; Klemm v. Dewes, 28 Ill. 317; Goudy v. Hall, 30 Ill. 109; Penobscot R. R. Co. v. Weeks, 52 Me. 456; Bruce v. Cloutman, 45 N. H. 37; Oswald v. Grey, 29 Eng. L. & Eq. 85; Peters v. Newkirk, 6 Cow. 103; Copeland v. Dir. of Min. Co. 33 Mich. 2; Mitchell v. Runkle, 25 Tex. Sup. 132; Simpson v. Knight, 12 Fla. 144; Falconer v. Montgomery, 4 Dall. 232; Crowell v. Davis, 12 Met. 293; Craig v. Hawkins, Hardin (Ky.), 46; Cobb v. Wood, 32 Me. 455; Curtis v. Sacramento, 64 Cal. 102."

[1] Wade on Law of Notice, sections 1148, 1149, 1154: "As to what the written or printed notice should contain, it may be stated generally, as such matters are regulated by statute, that whether the process be for actual, personal service, or for constructive service by publication, it must conform substantially to the requirements of the statute by which it is authorized. Karr v. Karr, 19 N. J. Eq. 427." "It is universally requisite, however, that original process should state the time and place of the trial with substantial correctness, and with reasonable certainty. It was accordingly held that where judgment was rendered upon an original notice, which did not state the time and place when and where defendant was required to appear and defend, it was not binding upon such defendant, and could be successfully attacked in a collateral proceeding, Kitsmiller v. Kitchen, 24 Iowa, 163. And though it is important that the venue should be correctly stated in the process, to the end that the party served may know

the court acquires jurisdiction after the lapse of the time fixed for the defendant's appearance, and if he fails his default will be entered. The court has necessarily the power to determine the sufficiency of service. If it determines this wrongfully

before what tribunal he is called to make his defense, still if the proper county is mentioned in the margin the insertion of a different county in the body of the summons would not render the same void. Such a defect may be cured by amendment. Relfe v. Valentine, 45 Ala. 286." Boswell's Lessee v. Otis, 9 How. 350: "It may be difficult in some cases to draw the line of jurisdiction so as to determine whether the proceedings of a court are void or only erroneous. And in such cases, every intendment should be favorable to a purchaser at a judicial sale. But the rights of all parties must be regarded. No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of law prescribed by the legislature for the security of absent parties. The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill. If this cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void." Ray v. Norseworthy, 23 Wall. 136: "Authorities to the same effect are very numerous, nor is there any well-considered case which gives any support to the proposition that the judgment, order, sentence or decree of a court, disposing of property subject to conflicting claims, will affect the rights of any one not a party to the proceeding, and who was never in any way notified of the pendency of the proceeding. Weed v. Weed, 25 Conn. 337; Means v. Means, 42 Ill. 50; Hill v. Hoover, 5 Wis. 386; Wallis v. Thomas, 7 Vesey, 292; Rockland W. Co. v. Pillsbury, 60 Me. 427; Lane v. Wheless, 46 Miss. 666; Hettrick v. Wilson, 12 Ohio St. 136; Vallejo v. Green, 16 Cal. 160." Nations v. Johnson, 24 How. 203: "Notice to the defendant, actual or constructive, however, is essential to the jurisdiction of all courts; and it was held by this court, in Webster v. Reid, 11 How. 460, that when a judgment is brought collaterally before the court as evidence, it may be shown to be void on its face by want of notice to the person against whom it is entered. Numerous cases, also, are cited by the counsel of the present plaintiffs, applicable to the judgments or decrees of a court exercising original jurisdiction, which assert the general rule that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And some of them go much further, and lay down the rule as applicable to the inception of the suit, that notice by publication is insufficient to support the judgment in any jurisdiction, except in the courts of the state where it was rendered. Boswell's Lessee v. Otis

and enters the default prematurely, the defendant should call its attention to it and ask that the default be set aside. Hence the rule that such an error is not jurisdictional, because the defendant was notified, and only had to come when he should have come, and could have had the mistake corrected.[1] It

et al. 9 How. 350; Oakley v. Aspinwall, 4 Comst. 514." Ætna Life Ins. Co. v. France et al. 91 U. S. 510; The Mary, 9 Cranch, 144; Pennoyer v. Neff, 95 U. S. 724; Hart v. Sansom, 110 U. S. 155–6; Hollingsworth v. Barbour, 4 Pet. 466–475; Knowles v. Gas Light Co. 19 Wall. 58; Schibsby v. Westenholz, L. R. 6 Q. B. 155.

[1] Freeman on Judgments, sec. 126: "There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. At common law the defendant was brought within the power of the court by service of the *brevia*, or original writ. In this country the same object is accomplished by service of summons, either actual or constructive, or of some other process issued in the suit; or by the voluntary appearance of the defendant in person or by his attorney. From the moment of the service of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral attack. Whitwell v. Barbier, 7 Cal. 54; Dorente v. Sullivan, 7 Cal. 279; Smith v. Bradley, 6 S. & M. 485; Moomey v. Maas, 22 Iowa, 380; Peck v. Strauss, 33 Cal. 678; Myers v. Overton, 2 Abb. Pr. 344; Hunter v. Lester, 18 How. Pr. 347; Haughey v. Wilson, 1 Hilton, 259; Kipp v. Fullerton, 4 Minn. 473; Cole v. Butler, 43 Me. 401; Hendrick v. Whittemore, 105 Mass. 23; Drake v. Duvenick, 5 Pac. Law Rep. 28; 45 Cal. 455; Myers v. Davis, 47 Iowa, 325; Sims v. Gray, 66 Mo. 613; Town of Lyons v. Cooledge, 89 Ill. 529; De Tar v. Boone Co. 34 Iowa, 488; Pope v. Hooper, 6 Neb. 178; Sacramento Savings Bank v. Spencer, 53 Cal. 737. A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case, the court acquires no jurisdiction and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon reasonable and proper application, or reversed upon appeal. Isaacs v. Price, 2 Dillon C. C. 351. A judgment is not void because rendered before or after the return day named in the summons. It is only liable to be vacated for irregularity. Glover v. Holman, 3 Heisk. 519; West v. Williamson, 1 Swan, 277. The rule that defective service of process does not render the judgment

was the defendant's fault that this was not done, and hence the law and reason say, you had opportunity to defend by having the default opened or set aside at the proper time.[1]

liable to successful collateral attack has been frequently enforced in Mississippi, a state in which the courts have, in other respects, been loth to accord any favors to records suffering from symptoms of jurisdictional infirmity. Christian v. O'Neal, 46 Miss. 669; Harrington v. Wofford, 46 Miss. 31; Campbell v. Hays, 41 Miss. 561. In case of an attempted service of process, the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, though erroneous, cannot be void. When, in a proceeding by attachment, the ground required by the statute for the issuing and execution of the process has been laid, and the process has been issued and executed, the jurisdiction of the court is complete. If the subsequent proceedings do not conform to law, the judgment may be reversed. When there has been an insufficient publication, or an entire failure to publish, the proceedings are not so invalidated as to be made void. Paine's Lessee v. Moreland, 15 Ohio, 435; Beech v. Abbott, 6 Vt. 586; Matter of Clark, 3 Denio, 167; Williams v. Stewart, 3 Wis. 773; Drake on Att. secs. 447, 448. A service of process defective in giving four days' notice when the law required five days' notice is nevertheless sufficient to support the judgment of a justice of the peace. Ballinger v. Tarbell, 16 Iowa, 491. But the process may be so defective as to be in substance no process, as when it does not state the place or time where and when the defendant is required to appear and make his defense. In such case it has been held that no jurisdiction had been obtained over the person of the defendant, and that the judgment had no validity against him. Kitsmiller v. Kitchen, 24 Iowa, 163. The same conclusion was announced where the officer serving the process was the plaintiff in the suit. Knott v. Jarboe, 1 Met. (Ky.) 505." Bunce v. Bunce, 59 Iowa, 535: "The court was not without jurisdiction, as in a case of no notice. It is true the plaintiff was then a minor, but the rule enunciated was not the less applicable. In Shawhan v. Loffer, 24 Iowa, 226, a question was raised similar to the one before us. The person served in that case was a minor. But the court said: 'If it appears that there was a notice, though it be defective, or the service thereof be imperfect, neither in strict compliance with the directions of the statute, and the court determine in favor of the sufficiency of such notice and service, which is shown upon the record, even though such determination was erroneous, the judgment of the court will not be held void in a collateral proceeding.' See the cases cited, and in addition thereto Dougherty v. McManus, 36 Iowa, 657; Woodbury v. McGuire, 42 id. 342; Farmers' Ins. Co. v. Highsmith, 44 id. 333."

[1] Wade on Notice, sec. 1358: "Where 'further notice' was provided for by statute for non-resident defendants (Mass. Gen. Stat. ch. 123, sec. 28; Id. ch. 126), it was held that when such non-resident was actually

The maxim that "the king can do no wrong" applies to the court who acts for and in place of the king or government. If it so happens that service was insufficient in fact, rather than in form, or if the return made by the officer was in fact false,

found and served within the commonwealth, he was not entitled to any further notice; but the service would be regarded as sufficient. Reeder v. Holcomb, 105 Mass. 93. This would depend, however, to some extent, upon the circumstances by which he was influenced or induced to come within the state where served. A party to a suit in chancery, pending in a state where he does not reside, who comes within such state for the purpose of testifying before a master, though he comes without subpœna *testificandum*, has been held exempt from the service of process during his sojourn for that purpose. Dungan v. Miller, 37 N. J. L. 182; Huddeson v. Prizer, 9 Phila. 65. So, where a person has been fraudulently enticed within the jurisdiction of the court, merely for the purpose of obtaining service of process in a contemplated suit against him, such service may be set aside and vacated as irregular. Baker v. Wales, 45 How. Pr. 137; S. C. 14 Abb. Pr. (N. S.) 331; Lagrave's Case, id. 334; Carpenter v. Spooner, 2 Sandf. 717; Hevener v. Heist, 9 Phila. 274. But where a citizen of another state, claiming to have been enticed within the territorial jurisdiction of the court for the purpose of obtaining service, suffered judgment to go by default and afterwards came in and asked to have it set aside on the ground of the fraudulent manner in which service was obtained, the court held that his objection came too late. It should have been raised on the return of the summons. Marsh's Adm'rs v. Bast, 41 Mo. 493. Defects in regard to service of process, as well as any other steps taken to obtain jurisdiction of the party, may be waived by voluntary appearance (Stewart v. Hibernian Banking Ass'n, 78 Ill. 596; People v. Burton, 65 N. Y. 452), but not by special appearance, for the purpose of raising the objection to the process. Simcock v. First Nat'l Bk. of Emporia, 14 Kan. 529. There must be some act done or word spoken in court in connection with the case. Rhoades v. Delaney, 50 Ind. 468; Steinbach v. Lesse, 27 Cal. 295. Myers v. Davis, 47 Iowa, 329: "It is next claimed that the service of the notice is not sufficient to confer jurisdiction. 1. It is said that no parties are named on whom the notice was served. The notice named specifically the persons to whom it is addressed, and the return states the petition and notice were served upon the widow and minor heirs named therein. This sufficiently specifies the parties served. 2. It is objected that the notice was read in the presence and hearing of the parties served, and not to them; that no copy of the notice was delivered or offered, and that no service was made on the father, mother or guardian of the minors, they being under fourteen years of age. It may be admitted that the service in this case was defective and that, upon appeal, the judgment would have been set aside. And yet it is not a case of no service, rendering the judgment of the court void for want of jurisdiction, and liable to collateral attack. In Morrow v. Weed, 4 Iowa, 77, it is said: 'If there be a notice or publication, or whatever of this nature the law requires in reference to persons or other mat-

or the notice was not sufficient in law to bring the party into court, or if the court lacked power to hear the case, or the defendant was served out of the jurisdiction, or if he died after process was served, and before the day of appearance, the jurisdiction fails.[1] If, however, the defendant was privileged from

ters, its sufficiency cannot be questioned collaterally.' When there is a service insufficient only in the manner of making it, a question of jurisdiction is raised which the court must decide, and if it does so erroneously the judgment, though voidable, is binding until reversed and corrected on appeal.' Bonsall v. Isett, 14 Iowa, 309. See, also, Pursley v. Hayes, 22 Iowa, 37; Shawhan v. Loffer, 24 Iowa, 226; Mooney v. Maas, 22 Iowa, 384." Bunce v. Bunce, 59 Iowa, 536: "What the plaintiff seeks to vacate is, not a judgment, but a mere probate order for a guardian's sale. The proceeding in which the order was made is, in no proper sense, an adversary proceeding, but a proceeding demanded by the interest of the ward. The application made is solely in the ward's behalf. It is in some sense his own application. It is made by his guardian, selected and appointed by the court to act for him, and bound by his oath and his bond to act properly for him, and under the directions of the court. If he is guilty of bad faith or negligence, and thereby involves his ward in loss, he and his bondsmen are liable therefor. These considerations show how different an order for a guardian's sale is from a judgment or order obtained against a ward in an action. Again, a rule which should give minors a year after attaining their majority to set aside all guardians' sales in which they could show irregularities amounting to error would evidently be detrimental to the interests of minors in general. It would tend to render purchases at guardians' sales too hazardous to enable the property to be sold for its value." See § 41, *ante*, note 3.

[1] Wade on Notice, sec. 1370: "It has been held that a recital in the judgment or decree of due service of process upon the defendant is sufficient to cure all defects in the service and return, of which advantage was not taken at or before the trial by objecting to the irregularity. Morrow v. Weed, 4 Iowa, 77, 87, and cases cited. In other words, that the judgment cannot be attacked collaterally on account of irregularity in the process, provided it appeared from the record that any process at all had been served. This doctrine, which seems to be evolved by a sort of circular reasoning, where premises and conclusion are constantly changing places, is maintained in the interest of the finality of judgments. It is said that the record shows due service, and, even though the judgment was by default, the presumption is that the question of service and return of process were submitted to the court and passed upon. The record declares that the defendant was properly served. Consequently that fact cannot be collaterally denied. But the jurisdiction of the court to make a record in the case depends upon the service of process. This requirement is met by the assertion that jurisdiction is shown by the record. So the service of process makes the record, and when this fails the record may make itself by assuming the facts upon which its existence

service by being a judge, member of the legislature, officer of a court engaged in official business, ambassador, foreign minister, or a servant of one, and not subject to the process of the court, the law out of respect to the court says you must communicate such knowledge to it and claim your privilege.[1]

So, if one of the same name is served by the process in place of the real defendant, he should appear and defend, or he is bound by the judgment; but if the process does not on its face run against him, but to one of the same name, either Christian or surname, he need not appear.[2]

The service must be made within the jurisdiction of the court, for the court, as has been seen, has no territorial jurisdiction beyond the defined district, whether state, county, town or municipality. If the service is made beyond the jurisdiction the judgment is void, unless in proceedings *in rem*. The defendant is bound to know the law of his own state and the jurisdiction of courts therein, also of any other in which

depends. The court has no jurisdiction to hear and determine the issues between parties litigant until the defendant has been duly served with process; yet, without due process, the court may decide, as a matter of fact, that process has been duly served, and upon the jurisdiction thus assumed render judgment against defendant, of which he has no notice, and consequently cannot appear and attack it by a direct proceeding until perhaps it is too late. This is the unfortunate position the defendant would occupy in a case where the service was otherwise than strictly personal, and the return correctly stated the manner in which the process was served." In real or personal actions at common law death of parties before judgment abates the suit. Green v. Watkins, 6 Wheat. 260. The death of a party pending suit does not, when the cause of action survives, amount to a determination thereof. Clarke v. Mathewson, 12 Pet. 164.

[1] Pollard v. Union Pacific R. R. Co. 7 Abb. Pr. (N. S.) 70; Ford v. Doyle, 37 Cal. 346. See p. 117, n. 3.

[2] Wade on Notice, secs. 1319, 1318: "It has been held, however, that a judgment against a party in his right name, which name varies from that appearing in all other stages of the proceedings, though process be personally served, would be of no avail against a defendant not appearing to the action. Moulton v. de ma Carty, 6 Rob. (N. Y.) 470." King v. Randlett, 33 Cal. 318. The object of serving the original process or other form of notice upon the party being to advise him of the pendency of the action or proceeding, it is more important that the proper party be served than that he be served by the proper name. As a rule, therefore, the service of process upon the proper party, but by a wrong name, will sustain a judgment entered against such party pursuant to the process served. Welsh v. Kirkpatrick, 30 Cal. 202; Parry v. Woodson, 33 Mo. 347; Morgan v. Woods, 33 Ind. 23.

he has placed his property; and if he is served in the state, the law does not notice his residence in fact, and he must appear and defend.[1]

[1] Harkness v. Hyde, 98 U. S. 476: "This was an action to recover damages for maliciously and without probable cause procuring the seizure and detention of property of the plaintiff under a writ of attachment. It was brought in September, 1873, in a district court of the territory of Idaho, for the county of Oneida. The summons, with a copy of the complaint, was soon afterwards served by the sheriff of the county on the defendant at his place of residence, which was on the Indian reservation known as the Shoshonee reservation. The defendant thereupon appeared specially by counsel appointed for the purpose, and moved the court to dismiss the action, on the ground that the service thus made upon him on the Indian reservation was outside of the bailiwick of the sheriff, and without the jurisdiction of the court. Upon stipulation of the parties, the motion was adjourned to the supreme court of the territory, and was there overruled. To the decision an exception was taken. The case was then remanded to the district court, and the defendant filed an answer to the complaint. Upon the trial which followed, the plaintiff obtained a verdict for $3,500. Upon a motion for a new trial, the amount was reduced to $2,500, for which judgment was entered. On appeal to the supreme court of the territory, the judgment was affirmed. The defendant thereupon brought the case here, and now seeks a reversal of the judgment, for the alleged error of the court in refusing to dismiss the action for want of jurisdiction over him. . . . The process of one of its courts, consequently, served beyond those lines, could not impose upon the defendant any obligation of obedience, and its disregard could not entail upon him any penalties. The service was an unlawful act of the sheriff. The court below should, therefore, have set it aside on its attention being called to the fact that it was made on the defendant on the reservation. The motion was to dismiss the action; but it was argued as a motion to set aside the service; and we treat it as having only that extent. The code of Idaho considers an action as commenced when the complaint is filed, and provides that a summons may be issued within one year afterwards. Had the defendant been found in Idaho, outside of the limits of the Indian reservation, he might during that period have been served with process. There can be no jurisdiction in a court of a territory to render a personal judgment against any one upon service made outside its limits. Personal service within its limits, or the voluntary appearance of the defendant, is essential in such cases. It is only where property of a non-resident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance, that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him, or his voluntary appearance to the action. Our views on this subject are expressed at length in the late case of Pennoyer v. Neff, 95 U. S. 714, and it is unnecessary to repeat them here." Butterworth v. Hill, 114 U. S. 132: The subpœna in this case was delivered to the commissioner of patents "in the District of Colum-

§ 46. In proceedings in rem.— It has already been stated that service in proceedings *in rem* is jurisdictional, and that the care one owes to his property is such that notice in part may be imparted to him through its seizure by a court; so he

bia, and his acceptance of service was made there. That is apparent from the face of his indorsement, and the letter which was written afterwards, and filed in the cause, undoubtedly as proof of the delivery of a copy of the bill which the law required should be served on him. Both the indorsement and the letter purport to have been written at Washington, and the letter in the patent office. Unless, therefore, the acceptance of service as indorsed on the writ is to be treated as a voluntary appearance by the commissioner in the court in Vermont, without objection to the jurisdiction, the case stands as it would if the process had been actually served on him in the District of Columbia by some competent officer. The circuit court was of the opinion that, by his acceptance of service, the commissioner waived all objection to the jurisdiction and consented to be sued away from the seat of government and from his residence. In this we think there was error. The fair meaning of the indorsement on the writ is that the commissioner admits the service with the same effect it would have if made by an officer in the District of Columbia. No appearance is thereby entered in the cause. Service of the subpœna in the District is acknowledged, but nothing more. In the letter which followed the indorsement of service, both counsel and the court were informed that the commissioner declined to appear. The parties proceeded, therefore, at their own risk and without the consent of the defendant to the jurisdiction of the court. Such being the case, we are of opinion that the court was without jurisdiction and had no authority to enter the decree which has been appealed from. The act of congress exempts a defendant from suit in any district of which he is not an inhabitant, or in which he is not found at the time of the service of the writ. It is an exemption which he may waive, but unless waived he need not answer and will not be bound by anything which may be done against him in his absence." Wade on Notice, secs. 1354, 1359: "However, where the statute provided that an original notice might be served by having the acknowledgment of service indorsed upon the notice dated and signed by the defendant, a notice so served was held to require no further formal proof of service than such acknowledgment, and that a waiver of service so indorsed was equivalent to such acknowledgment, and was good though made in another state. Johnson v. Monell, 13 Iowa, 300. But see Chickering v. Failes, 26 Ill. 507, where it is held that acknowledgment of service will not be sufficient; McDaniel v. Correll, 19 Ill. 226. Service of process on Sunday or upon a legal holiday is clearly irregular, and may be pleaded in abatement or set aside on motion. But when the case has been allowed to go to judgment by default, on such irregular service, the judgment will neither be held void nor reversible on account of the irregularity. Comer v. Jackson, 50 Ala. 384." Where constructive service by publication is substituted in place of personal service, the statute must be strictly pursued. Galpin v. Page, 18 Wall. 350. Substituted service under a statute, if ever sufficient, can only be made when the condition upon

may and should look to the law of the state where the property is and inquire and ascertain how notice may be given, and whether it has been given. This done, if found that his property has been attached and is held by a court, he should look to his property and the suit, or he may abandon the former. The rule concerning service is that a strict and technical compliance with the statute is necessary.[1]

which it is permissible is shown to exist. Settlemier v. Sullivan, 97 U. S. 444, A personal judgment, rendered by a state court in an action on a money demand against a non-resident, served by publication, but not personally when within the state, and who did not appear, is void. Pennoyer v. Neff, 95 U. S. 714. The same principle applies to a personal judgment against foreign corporations. St. Clair v. Cox, 106 U. S. 350. Substituted service in any authorized form is sufficient to inform a non-resident of the object of proceedings, if the property is once brought under control of court by seizure or some equivalent act. Pennoyer v. Neff, 95 U. S. 714. But, except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, substituted service is only sufficient where the action is *in rem*. Id. A decree of divorce obtained by the husband on notice to his wife by publication, which is insufficient to support the jurisdiction, is no bar. Cheely v. Clayton, 110 U. S. 701. Hawes on Jurisdiction, sec. 233: "It is doubtless competent for each state to adopt its own mode of bringing parties into court, but its laws can only operate within its own territory; they cannot be extended beyond the limits of the state, nor operate upon citizens of other states, unless they voluntarily go within its limits. Courts therefore cannot acquire jurisdiction *in personam* of persons not found in the state or district, nor at all if no property belonging to them is found there. Smith v. Eaton, 36 Me. 291; 58 Am. Dec. 746; Mattingly v. Corbit, 7 B. Mon. 376; Austin v. Bodley, 4 Mon. 434. . . . In such case the court must acquire jurisdiction over the property of the defendant in the state, and its seizure, or that which is equivalent thereto, as, for instance, the levy of an attachment or garnishment upon it, is the one essential requisite of jurisdiction without which the court can proceed no further. . . . It may therefore be stated as a general rule that jurisdiction over the person of a non-resident out of the territorial limits of the jurisdiction cannot be obtained by a service of process by publication. Belcher v. Chambers, 53 Cal. 640, overruling Hahn v. Kelly, 34 Cal. 391; Pennoyer v. Neff, 95 U. S. 714, overruling S. C. 3 Sawy. 274; Hart v. Sansom, 110 U. S. 151; Collinson v. Teal, 4 Sawy. 248; Parrott v. Alabama Ins. Co. 11 The Reporter, 425; S. C. 5 Fed. Rep. 391; Clayton v. Clayton, 4 Colo. 415; Dearing v. Bank of Charleston, 5 Ga. 497; S. C. 48 Am. Dec. 300; King v. Vance, 46 Ind. 246; Cooper v. Smith, 25 Iowa, 269; Lutz v. Kelly, 47 Iowa, 310; Foster v. Henderson, 54 Iowa, 220; Eaton v. Badger, 33 N. H. 228; Smith v. Montoya, 1 West C. Rep. (N. M.) 152; Peck v. Cook, 41 Barb. 551; Clarke v. Boreel, 21 Hun, 595; Bartlett v. Spicer, 75 N. Y. 528; Miller v. Miller, 1 Bailey, 242."

[1] Wade on Notice, sec. 1030: "As this manner of serving process de-

The state owes the duty to its subjects to protect their legal rights, even by subjecting the property of non-residents to the payment of the debts due its citizens or other residents, and through its courts will subject their property to such purpose by first seizing it, and, after seizure, by publication or warning to the defendant owner of the pendency of the suit, and notice to defend, and then, whether he appears or not, the court will proceed. The statute allowing service by publication is in derogation of the common law and must be strictly pursued; and also the method of reaching the property.[1]

pends for its validity more upon its strict conformity to the statute by which it is authorized than upon any inherent probability of its conveying intelligence of the impending suit to the party whose rights are to be affected, the fact that it has actually come to the knowledge of defendant cannot be shown to supply any material deviation in the publication from what the statute prescribes. The statute being in derogation of common law is always strictly construed, and it must be shown affirmatively that its provisions have been complied with. Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Likens v. McCormick, 39 Wis. 313." Grigsby v. Barr, 14 Bush, 333; Cooper v. Reynolds, 10 Wall. 319; Pennoyer v. Neff, 95 U. S. 723; Holly v. Bass, 63 Ala. 391; Fontaine v. Houston, 58 Ind. 316. Wade on Notice, sec. 1086: "In general, a strict adherence to statutory requirements is not so essential to a valid sale under a judgment or decree of a court as it is to the support of a title acquired under an involuntary sale made without such judgment or decree. The grounds of the distinction are the notoriety of the proceeding in court by which the judgment was obtained, and the fact of defendant's having already been brought in by process, and consequently is supposed to watch all subsequent proceedings likely to affect his interest until the property levied upon to satisfy the judgment has been disposed of. It has accordingly been held that the provision of the statute requiring the advertisement of judicial sales was directory, and that a purchaser at such a sale, made without the publication of the notice directed by the statute, who purchased without any knowledge of the omission of duty by the officer, would take a good title, and any one injured by the official misprision would be remanded to his remedy against the delinquent officer. Minor v. Natchez, 4 S. & M. 602; Hendrick v. Davis, 27 Ga. 167; Johnson v. Reese, 28 Ga. 353; Harvey v. Fisk, 9 Cal. 93."

[1] Hawes on Jurisdiction, sec. 234: "Statutes providing for constructive service of process by publication or otherwise, in place of personal citation, in proceedings against persons without the state, are in derogation of the common law and must be strictly followed. Galpin v. Page, 18 Wall. 364; Gray v. Larrimore, 2 Abb. (U. S.) 542; Cissell v. Pulaski County, 3 McCrary, 446; Sayre v. Elyton L. Co. 73 Ala. 86; Chandler v. Hanna, 73 Ala. 390; Israel v. Arthur, 1 West C. Rep. (Colo.) 286; Brown v. Tucker, 1 West C. Rep. (Colo.) 489; Boyland v. Boyland, 18 Ill. 551; Fontaine v. Houston, 58 Ind. 316; Bradley v. Jamison, 46 Iowa, 68; McDonald v. Vaughan, 13 La. Ann. 405; Stewart

§ 47. Appearance.—Jurisdiction partakes of two natures, one over the subject-matter of the controversy, the other over the defendant. If the court does not possess the legal power to decide the question involved, then jurisdiction cannot be acquired by consent. But when the only requisite to the jurisdiction is the service of notice on the defendant, he, by appearance, may waive this requirement. In other words, a party may appear and give the court jurisdiction whenever the court would have exercised jurisdiction had service been made on him.[1] When the law prescribes a certain mode for adjusting the rights of parties, that mode must be pursued, and it cannot be varied where jurisdictional.[2] But an appearance to plead a privilege from being sued, or to show that because of his residence he was not subject to the jurisdiction of the court in that county, city or district, to show that the action is local, or that it is such that the issue cannot be tried there, or for any jurisdictional cause, is not such an appearance as will give jurisdiction.[3]

It is held in some states that a person may specially appear in an action to show that a proper return of service has not

v. Stringer, 41 Mo. 400; Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Wheeler v. Cobb, 75 N. C. 21; Pollard v. Wegener, 13 Wis. 569; Zecharie v. Bowers, 1 Smedes & M. 584; 40 Am. Dec. 111. And the fact that the statute has been strictly followed must be proved, no presumption of jurisdiction being indulged in. Galpin v. Page, 18 Wall. 364; Cofield v. McClelland, 16 Wall. 331; Thatcher v. Powell, 6 Wheat. 126; Gray v. Larrimore, 4 Sawy. 638; Jordan v. Goblin, 12 Cal. 100; Ricketson v. Richardson, 26 Cal. 149; McMinn v. Whelan, 27 Cal. 300; Commonwealth v. Blood, 97 Mass. 538; Morse v. Presby, 25 N. H. 302; Hallett v. Righters, 13 How. Pr. 46.

[1] Michales v. Hine, 3 G. Gr. (Iowa) 470; Fields v. Walker, 23 Ala. 167; Andrews v. Wheaton, 23 Conn. 116; Commissioners v. Low, R. M. Charlt. 298; Central Bank v. Gibson, 11 Ga. 458; Ginn v. Rogers, 4 Gilm. 131; Dicks v. Hatch, 10 Iowa, 380; Abat v. Songy, 7 Mart. (La.) 276; Richardson v. Hunter, 23 La. Ann. 257; State v. Bonney, 34 Me. 225; Vose v. Morton, 4 Cush. 31; Bell v. Railroad Co. 4 S. & M. 562; Cottrell v. Thompson, 15 N. J. L. 344; Hawkins v. Hughes, 87 N. C. 118; Bentz v. Graves, 8 McCord, 280; McHenry v. Wallen, 2 Yerg. 444; McCall v. Peachy, 1 Call, 55; Damp v. Dane, 29 Wis. 431.

[2] See above.

[3] See sec. 45, n. 7; Foote v. Richmond, 42 Cal. 443; Aultman v. Steinan, 8 Neb. 112; Bank of Valley v. Bank of Berkeley, 3 W. Va. 386; Coad v. Coad, 41 Wis. 26; Harkness v. Hyde, 98 U. S. 476. But he cannot occupy an ambiguous attitude. Tower v. Moore, 52 Mo. 120. If one appear and withdraw his appearance, he leaves the matter as if he had not appeared. Graham v. Spencer, 14 Fed. Rep. 608.

been made on him, but the practice of permitting one to appear for such a purpose is declining. Where a party appears for the purpose of showing some jurisdictional defect he may by a general appearance bring himself under the jurisdiction of the court; and courts are opposed to the practice of having one appear to tell them he is not there. It is sufficient to say that a general appearance waives service of process.

§ 48. Service on joint debtors and partners for firm.— A partnership has a purse of its own and in some states may sue and be sued in the partnership name; so where partners are sued individually on a partnership debt, no good reason can be suggested why service on one member of the firm may not be declared by statute sufficient to bind the partnership property, each partner being the agent of the firm, and notice to one might be considered as notice to all; but surely no judgment should be rendered on such a notice as would bind the individual property of the members not served, and not appearing, unless *scire facias* first issue to those not served. Such a statute would be unwise, unjust and in violation of the constitution by taking property "without due process of law."[1]

[1] In Mason v. Eldred, 6 Wall. 239, the court say: "Judgments in cases of this kind against the parties not served with process or who did not appear therein have no binding force upon them personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him and opportunity to be heard is afforded." In Nixon v. Downey & Wolverton, 42 Iowa, 79, Miller, C. J., says: "This judgment must be reversed. There was no evidence whatever tending to show that any partnership had existed as alleged in the plaintiff's petition. . . . The original notice was served only on W. A service upon one partner, during the existence of the partnership, gives the court jurisdiction over each member in an action against the firm. Saunders v. Bentley, 8 Iowa, 516; Walker v. Clark, id. 474; Gregory, Tilton & Co. v. Harmon, 10 id. 445; Stephens v. Parkhurst & Pense, id. 70. . . . The record does not show that D., either by himself or by counsel, asked the action of the court in any matter, or for any purpose connected with the action, or that he filed or procured to be filed any paper of any kind whatever therein, or that he employed counsel for any purpose connected with the cause. It shows only that he was examined as a witness for W. This was not an appearance within the meaning of the statute." See D'Arcy v. Ketchum, 11 How. 165, and cases cited; Public Works v. Columbia College, 17 Wall. 527; Hall v. Lanning, 91 U. S. 160; Hanley v. Donoghue, 116 U. S. 3; Renaud v. Abbott, 116 U. S. 287. 1 Lindley on Partnership, Ewell's 2d ed., p. 272: "Where partners are

Where the law provides, as it does in some states, that in actions against joint debtors a formal judgment may be entered against all when part only are served with process, but no execution shall issue against the separate property of those not served, but may issue against the joint property of all, such statutes, and judgments rendered thereunder, have been sustained.[1] This rule has been doubted and such statutes declared unconstitutional in other states; and this is the better rule.[2] There should be service on all who desire to defend and

sued in the name of the firm, service of the writ on one of them is sufficient; but all the partners must appear individually in their own names. To the point that service of process on one partner is not equivalent to service on all, see Rice v. Doniphan, 4 B. Mon. 123; Faver v. Briggs, 18 Ala. 478; Duncan v. Tombeckbee Bank, 4 Port. 181; Demoss v. Brewster, 4 S. & M. 661; Scott v. Bogart, 14 La. Ann. 261; Beal v. Snedicor, 8 Port. 523. A judgment rendered in another state against all the members of a partnership after the dissolution of the partnership does not personally bind a member of said partnership not served with process and not appearing in the case, although the other members were served or appeared and caused an appearance to be entered for all. Bowler v. Huston, 30 Gratt. 266. . . . Partnership property, or the separate property of the partner served, may, however, in many of the states, be subjected to the debts of the partnership by service of citation on one member of the firm. Alexander v. Stern, 41 Tex. 193; Hale v. Van Saun, 18 Iowa, 19; Flannery v. Anderson, 4 Nev. 437; Brooks v. McIntyre, 4 Mich. 316; Stoutenburgh v. Vanderburgh, 7 How. Pr. 229. . . . If firm property has been *bona fide* conveyed to one, it cannot be subjected to a judgment against the firm to which he was not made a party, upon a mere suggestion, on an attempt to levy on the property, that he was a copartner, as that would be to bind him as a partner without notice or suit, and without any regular proceeding against him as such. Strong v. Hines, 35 Miss. 201. . . . In Iowa, service upon one member of a firm is sufficient to give the court jurisdiction over the other members of the firm. Gregory v. Harmon, 10 Iowa, 445; Walker v. Clark, 8 Iowa, 474; Saunders v. Bentley, id. 516. But a service made on one partner after a dissolution of the firm is insufficient in a case where the interest of the partner upon whom the service is made is adverse to that of the partners who are not served with notice. Stephens v. Parkhurst, 10 Iowa, 70."

[1] See note 1, p. 134.

[2] Elliott v. Holbrook, 33 Ala. 665; Ingraham v. Gildermeester, 2 Cal. 88; Schloss v. White, 16 Cal. 68; Inos v. Winspear, 18 Cal. 397; Barlow v. Reno, 1 Blackf. 252; Christy v. Sherman, 10 Iowa, 535; Edwards v. Pitzer, 12 Iowa, 607; North v. Mudge, 13 Iowa, 496; Dresser v. Wood, 15 Kan. 344; Mitchell v. Greenwald, 43 Miss. 167; Everson v. Gehrman, 1 Abb. Pr. 167; Stoutenburgh v. Vandenburgh, 7 How. Pr. 229; St. John v. Holmes, 20 Wend. 609; 32 Am. Dec. 603; Bitzer v. Shunk, 1 Watts & S. 340; 37 Am. Dec. 469; York Bank's Appeal,

are interested in the controversy; there is not such a privity of contract, interest or agency between joint debtors as to justify so arbitrary a proceeding, and it opens the door for fraud. No judgment should bind the property, whether it is joint or individual, or cut off the right of defense of any one not legally before the court.[1]

§ 49. **Waiver.**— A defendant who resides out of the jurisdiction of the court may appear and waive the jurisdictional, or rather the personal, right that he may have, arising from that circumstance.[2] So, too, where by reason of a privilege of not being subject to suit by reason of his being a judge or officer of a court.[3] But where an appeal is given, on its being perfected as required by law, an appearance does not waive the jurisdictional right. But a judgment or decree may be opened by assent in the court of original jurisdiction which rendered it and the correction be made.

Any jurisdictional right belonging to a party may be waived; but if one be a state officer and acting as such, and the question be one of discretion pertaining to his office, he cannot waive, or by consent grant, the power to the court to decide such question, for the right is not his, it concerns the state; besides, the court has no power or control over it.[4] When

36 Pa. St. 458; Shedd v. Bank, 32 Vt. 709; Remington v. Cummings, 5 Wis. 138.

[1] See notes to §§ 41, 42, 45, and general note at end of chapter.

[2] The admission of irregular proof in an action may be done by assent of parties; or by a stipulation the parties may show they are before the court. Railroad Co. v. Ramsey, 22 Wall. 326. So where the defendant is exempt by privilege from the jurisdiction, that may be waived. Bostwick v. Perkins, 4 Ga. 50.

[3] A party may waive any provision of a statute, contract or constitution intended for his benefit. See Shutte v. Thompson, 15 Wall. 159; In re Cooper, 93 N. Y. 507. In the case last cited the court say: "It is very well settled that a party may waive a statutory and even a constitutional provision made for his benefit, and having once done so he cannot afterwards ask for its protection. Lee v. Tillotson, 24 Wend. 337; Embury v. Conner, 3 N. Y. 511." The right of a criminal to be confronted by the witnesses against him is personal with the accused and not jurisdictional, and may be waived; so held in a case where, by assent of the accused, a written transcript of the testimony taken on a former trial was read to the jury in place of recalling the witnesses. State v. Polson, 29 Iowa, 133; State v. Fooks, 65 Iowa, 452.

[4] Decatur v. Paulding, 14 Pet. 516: "The interference of the courts with the performance of the ordinary duties of the executive departments of

the question sought to be waived in effect increases or diminishes the power of the court over the subject-matter, or the act is required to be performed in a prescribed manner, or before a designated tribunal, then a waiver is ineffectual. In-

the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them. Upon the very subject before us the interposition of the courts might throw the pension fund and the whole subject of pensions into the greatest confusion and disorder. It is understood from the secretary's return to the *mandamus* that in allowing the half-pay it has always been calculated by the pay-officer; and that the rations or emoluments to which the officer was entitled have never been brought into the calculation. Suppose the court had deemed the act required by the resolution in question a fit subject for a *mandamus*, and, in expounding it, had determined that the rations and emoluments of the officer were to be considered in calculating the half-pay? We can readily imagine the confusion and disorder into which such a decision would throw the whole subject of pensions and half-pay, which now forms so large a portion of the annual expenditure of the government and is distributed among such a multitude of individuals. The doctrines which this court now hold in relation to the executive departments of the government are the same that were distinctly announced in the case of Kendall v. The United States, 12 Pet. 524. In page 610 of that opinion the court say: 'We do not think the proceedings in this case interfere in any respect whatever with the rights or duties of the executive, or that it involves any conflict of powers between the executive and judicial departments of the government. The *mandamus* does not seek to direct or control the postmaster-general in the discharge of any official duty, partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act which neither he nor the president had any authority to deny or control.' And in page 614 the court still more strongly state the mere ministerial character of the act required to be done in that case, and distinguish it from the official acts of the head of a department where judgment and discretion are to be exercised. The court there say: 'He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts are kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct or positive command of the law, and the act required to be done is, in every sense, a mere ministerial act.' We have referred to these passages in the opinion given by the court in the case of Kendall v. The United States in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a duty imposed upon him in his official character as the head of such department, in which judgment and discretion are to be exercised. There was in that case a difference of opinion in the court in relation to the power of the circuit court to issue the *manda-*

fants cannot waive their rights, because of want of capacity. A criminal cannot consent to try a cause before the court when the law requires a trial by jury.[1] Clients have

mus. But there was no difference of opinion respecting the act to be done. The court were unanimously of opinion that in its character the act was merely ministerial. In the case before us it is clearly otherwise; and the resolution in favor of Mrs. Decatur imposed a duty on the secretary of the navy which required the exercise of judgment and discretion; and in such a case the circuit court had no right, by *mandamus*, to control his judgment and guide him in the exercise of a discretion which the law had confided to him. We are therefore of opinion that the circuit court were not authorized by law to issue the *mandamus*, and committed no error in refusing it. And as we have no jurisdiction over the acts of the secretary in this respect, we forbear to express any opinion upon the construction of the resolution in question." United States v. Black, 128 U. S. 45: "It has been held in numerous cases, and was held after special discussion in the cases of Kendall v. The United States, 12 Pet. 524, and United States v. Schurz, 102 U. S. 378, that the former circuit court of the district and the present supreme court of the district, respectively, were invested with plenary jurisdiction on the subject. On this point there is no further question. The two leading cases which authoritatively show when the supreme court of the district may and when it may not grant a *mandamus* against an executive officer are the above cited cases of Kendall v. The United States on the Relation of Stokes, 12 Pet. 524, and Decatur v. Paulding, 14 Pet. 497. The subsequent cases have followed the principles laid down in these, and do little more than illustrate and apply them."

[1] State v. Kaufman, 51 Iowa, 578 (Seevers, J.): "It is provided by statute that 'the jury consists of twelve men, accepted and sworn to try the issue. All qualified electors of the state . . . are competent jurors in their respective counties.' Code, secs. 227, 4397. Both these statutory provisions have equal force. If one can be waived so may the other. It was said in The State v. Groome, 10 Iowa, 308: 'If the defendant knew, at the time the jury was sworn, that any of them were not qualified to act as jurors, he would have waived his right to object thereafter.' This decision was made under the code of 1851, but sections 1630 and 2971 thereof are precisely the same as sections 227 and 4397 of the code. That a defendant in a criminal action, by silence, may waive the benefit of a statutory provision was clearly recognized. There are several other decisions which recognize the same principle. Hughes v. The State, 4 Iowa, 554; The State v. Ostrander, 18 id. 435; The State v. Reid, 20 id. 413; and The State v. Felter, 25 id. 67. It must, therefore, be regarded as the settled doctrine in this state that a defendant in a criminal action, with the consent of the state and court, may waive a statute enacted for his benefit. . . . The authorities are not in accord on the question under discussion. The foregoing views are sustained by Commonwealth v. Dailey et al. 12 Cush. 80; Murphy v. Commonwealth, 1 Met. (Ky.) 365; Tyra v. Same, 2 id. 1. The crime charged in these cases was a misdemeanor, but in the first case this fact

rights that an attorney cannot waive, as submitting a cause possessed no significance. The ruling is based on principle applicable to all criminal actions. We are unable to see how it is possible to draw a distinction in this respect between misdemeanors and felonies, because the constitution does not recognize any such distinction. The contrary conclusion was reached in Cancemi v. The People, 18 N. Y. 128; Allen v. The State, 54 Ind. 461; and Bell v. The State, 44 Ala. 393. In neither of these cases was the question largely considered. Substantially, they all seem based on the thought that 'it would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and, we think, ought not to be tolerated.' Cancemi v. The People, before cited. This would have been much more convincing and satisfactory if we had been informed why it would be 'highly dangerous' and should 'not be tolerated,' or at least something which had a tendency in that direction. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used. In Bullard v. The State, 38 Tex. 504, the verdict was rendered by thirteen jurors. It was set aside. But it does not appear whether or not the defendant had any knowledge until after verdict there was that number of jurors. In Williams et al. v. The State, 12 Ohio St. 622, a jury trial was waived and the defendants found guilty by the court. On appeal the attorney-general submitted to a reversal on the ground that a jury trial could not be waived. The case was disposed of by the court in a single line by saying such was the opinion of the court. It is evident the case was not very elaborately considered. The following cases hold that a trial by jury cannot be waived and the same take place before the court: Bond v. The State, 17 Ark. 290; The People v. Smith, 9 Mich. 193; League v. The State, 36 Md. 257. The constitution of this state provides that 'in all criminal prosecutions . . . the accused shall have the right . . . to be confronted with the witnesses against him.' Art. 1, sec. 10, Code, 770. In The State v. Polson, 29 Iowa, 133, 'it was agreed in open court between the district attorney and the counsel of the defendant, in the presence of the defendant and of the jury, that in order to save time and facilitate the trial of the cause the testimony taken upon the former trial should be read to the jury as a substitute for the oral testimony of the witnesses in court.' A conviction followed, which was held to be right, and that the constitutional provision was a personal right, and in no manner affected the jurisdiction of the court, and that it might be waived. This decision in principle is identical with the case at bar. If one constitutional provision may be waived why not another? The one is no more binding and obligatory than the other. Both are equally important."

State v. Carman, 63 Iowa, 131: "In our code of criminal procedure there is no provision for the waiver of a jury. On the other hand, it is provided that 'an issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded.' Sec. 4350. We regard this provision as excluding the juris-

to trial before an illegal court, or waiving a jury in a criminal case.[1]

diction of the court, without a jury, to try such issue. The question presented is not as to the waiver of a mere statutory privilege, but an imperative provision, based, as we view it, upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man, and always will be so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea. If the language of the statute were less imperative than it is, the adjudications would support us in reaching the same conclusion. Hill v. People, 16 Mich. 351; State v. Maine, 27 Conn. 281; Bond v. State, 17 Ark. 290; Wilson v. State, 16 Ark. 601; League v. State, 36 Md. 257; Williams v. State, 12 Ohio St. 622; People v. Smith, 9 Mich. 193; United States v. Taylor, 3 McCrary, 500." That a personal right or statutory privilege conferred on a person accused of crime may be waived by the accused has been held in Hughes v. State, 4 Iowa, 554; State v. Groome, 10 id. 308; State v. Ostrander, 18 id. 435; State v. Reid, 20 id. 413; State v. Felter, 25 id. 67." State v. Larrigan, 66 Iowa, 426: "The defendant was indicted, tried and convicted of a felony, by the court, a trial by jury having been waived. It has been held that such a conviction is illegal. State v. Carman, 63 Iowa, 130."

[1] Where there is a voluntary appearance, for the general purpose of defense, there is, of course, no necessity of a summons. And the appearance may be made by an attorney. Wasson v. Cone, 86 Ill. 46; McCormick v. Pennsylvania R. Co. 49 N. Y. 303. If an appearance is made specially for the purpose of objecting to the jurisdiction, the motion must be restricted to this specific purpose, or else it will confer general jurisdiction in the case. Aultman Taylor Co. v. Steinan, 8 Neb. 109. A motion to change the venue confers such jurisdiction. Taylor v. R. R. Co. 68 Mo. 397. And more especially, if there is a plea entered as to the merits, it is too late afterwards to raise the question of jurisdiction of the person. Gott v. Brigham, 41 Mich. 227. And it has ever been held that if one appears by attorney or in person to object to the jurisdiction he cannot afterwards object to the sufficiency of the summons or notice. Church v. Crossman, 49 Iowa, 444. And an appearance may be made by a written memorandum of the defendant, stating that he waives notice and makes a voluntary appearance. Shaw v. Bank, 49 Iowa, 179. And so a party who voluntarily intervenes in an action cannot afterwards deny the jurisdiction of the court therein. Jack v. Railroad, 49 Iowa, 627. In all cases the objection must be raised promptly. Dake v. Miller, 15 Hun, 356. However, where the objection is not as to personal jurisdiction, but is to the effect that the court has not jurisdiction of the action, on the ground of venue, or any other ground going to the essential jurisdiction of the cause, a general appearance is not a waiver. Wheelock v. Lee, 74 N. Y. 495. On the general

§ 50. Failure to plead jurisdiction — Effect of.— There are other matters that may be waived aside from service. By failing to plead to the jurisdiction, as where the party by reason of residence could not be served in the county or district, or by failure to raise a jurisdictional question which does not go to the subject-matter, he waives it. So, where the declaration does not sufficiently show the citizenship in the federal courts, where the parties must be residents of different states, and the case is tried on the merits and finally determined, it is waived.[1] So, when a party would be entitled to a

principle that consent cannot give jurisdiction of a subject-matter, parties cannot waive the want of jurisdiction so as to make experimental cases for the courts (Georgia, etc. Loan Association v. McGowan, 59 Ga. 811); for waiver pertains alone to jurisdiction of the person. Where jurisdiction depends on the "residence" of a person, the word "residence" is to be regarded as denoting permanence, and not a mere temporary stay in a particular locality. Bank v. Reed, 45 Conn. 391; Church v. Crossman, 49 Iowa, 444. A minor cannot make an appearance so as to waive service of process or legal notice. Bonnell v. Holt, 89 Ill. 71; Carver v. Carver, 64 Ind. 194; Helms v. Chadbourne, 45 Wis. 60.

[1] The defendant in an indictment, by offering himself as a witness, waives his right to object to any question pertinent to the issue, on the ground that the answer may tend to criminate him. Commonwealth v. Lannan, 13 Allen, 563; Commonwealth v. Mullen, 97 Mass. 545. By pursuing one of two inconsistent remedies the party waives his right of action under the other. Connihan v. Thompson, 111 Mass. 270. Dillon's Removal of Causes, section 124: "Where the only objection in the federal court to the removal is, that the application was not made in the state court in time, this objection may undoubtedly be waived by acquiescence, or even the failure of the other party to make it the ground of an objection to the jurisdiction of the federal court in proper time; and it will be waived, we think, unless the objection be made by the party entitled to make it, before he takes any affirmative action in the federal court, or voluntarily submits himself to its action. The objection that the application to remove the cause was not made in time may be conclusively waived by submitting to the jurisdiction of the circuit court by taking testimony, and by delaying the objection for an unreasonable time. French v. Hay, 22 Wall. 244; Ames v. Colorado Central R. R. Co. 9 Ch. L. N. 132 (1876); S. C. 4 Cent. L. J. 199; Young v. Andes Ins. Co. 3 Cent. L. J. 719." Polk County v. Hierb, 37 Iowa, 363: "At the time the application for change of venue was made the cause was properly pending in the district court as a law action. Without making any motion to transfer to the equity side of the court, defendant moved for a change of venue. The court properly, therefore, changed the venue to the circuit court. Laws 13th Gen. Assem. ch. 167, sec. 14. When the case came into the circuit court, it was determined that the cause was one of equitable

change of venue or place of trial to another county, it may be waived; or whenever a plea to the jurisdiction must be specially pleaded and it is not, this will waive it. The appearance of a party to the merits of a cause waives any jurisdictional question that might have been cured if service in the proper bailiwick had been made.[1]

While jurisdiction over the subject-matter cannot be waived, because the defendant cannot confer a power on the court it does not possess, any matter relating to service of process or form of pleading that could have been taken advantage of by special demurrer, any question that could have been presented on appeal by argument and proper assignment of error, may be waived. Where a fact going to the jurisdiction of the court could have been pleaded, but not apparent on the face of the bill, it may be waived by failure to plead, even though jurisdictional in its character, for such fact is exclusively within the knowledge of the defendant; and the province of the court is to decide what is before it, not to assume the duty to defend.

cognizance. The case is not like one where a plaintiff voluntarily presents his case to a court which has no jurisdiction. He applied to a court of competent jurisdiction. He is in the circuit court, not from his own volition, but because of the action of the district court, and of the defendant. It would be unjust to allow the defendant to procure this change to the circuit court, and then to procure a dismissal of the cause because of that court's want of jurisdiction. If in fact the circuit court had no jurisdiction, the proper course, it seems to us, would be to remand the cause to the court from which it emanated, in order that the venue might be changed to the proper court. Great hardship might result from the sustaining of a demurrer, working, in effect, a dismissal of the cause. If this cause had been sent back to the district court, that court could have done nothing other than to change the venue to this circuit court, for at the time defendant appeared the circuit court had jurisdiction over equitable causes."

[1] See § 45, p. 125, n. 1.

NOTE TO CHAPTER.

Ferguson v. Crawford, 70 N. Y. 253, 259: "There are many cases in other states and in the courts of the United States containing expressions, general in their character, which would seem to sanction the doctrine that a want of jurisdiction over the person or subject-matter may in all cases be shown by extrinsic evidence, and they are sometimes cited as authorities to that effect. Elliott v. Piersol, 1 Pet. 340; Hollingsworth v. Barbour, 4 id. 466; Hickey v. Stewart, 3 How. (U. S.) 750; Shriver v. Lynn, 2 id. 43; Williamson v. Berry, 8 How. (U. S.) 495; Same v. Ball, id. 566; Gwin v. McCarroll, 1 Sm.

& M. 351; Enos v. Smith, 7 id. 85; Campbell v. Brown, 6 How. (Miss.) 106; Shaefer v. Gates, 2 B. Mon. 458; Wilcox v. Jackson, 13 Pet. 498; Miller v. Ewing, 8 Sm. & M. 421. . . . There are some cases which hold that the want of authority of an attorney to appear may be shown by extrinsic evidence, although the record states that an attorney appeared for the party, but those are placed expressly on the ground that such evidence does not contradict the record. Bodurtha v. Goodrich, 3 Gray, 508; Shelton v. Tiffin, 6 How. (U. S.) 186; 14 How. 340. Those cases are, however, in conflict with the decision of this court in Brown v. Nichols, 42 N. Y. 26, and in many other cases. . . . As has been already stated, our courts have settled by adjudication in regard to judgments of sister states, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence; and have further decided (in opposition to the holding of courts of some of the other states) that this may be done even if it involves the contradiction of a recital in the judgment record. In stating the reasons for this conclusion, our courts have founded it on general principles quite as applicable to domestic judgment as to others, and, save in one case (Kerr v. Kerr, 41 N. Y. 272), have in their opinions made no discriminations between them. Borden v. Fitch, 15 Johns. 121; 8 Am. Dec. 225; Starbuck v. Murray, 5 Wend. 148; 21 Am. Dec. 172; Noyes v. Butler, 6 Barb. 613, and cases cited. When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question, for under the provisions of the constitution of the United States, which require that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, it is now well settled that, when a judgment of a court of a sister state is duly proved in a court of this state, it is entitled here to all the effect to which it is entitled in the courts of the state where rendered. If conclusive there, it is equally conclusive in all the states of the Union; and, whatever pleas would be good to a suit therein in the state where rendered, and none others, can be pleaded in any court in the United States. Hampton v. McConnel, 3 Wheat. 234; Story's Com. on Const. sec. 183; Mills v. Duryee, 7 Cranch, 481. . . . A want of jurisdiction in the court pronouncing it may always be set up when it is sought to be enforced, or when any benefit is claimed under it; and the principle which ordinarily forbids the impeachment or contradiction of a record has no sort of application to the case. The *dicta* of our judges are all to the same effect, although the precise case does not seem to have arisen. In Bigelow v. Stearns, 19 Johns. 41; 10 Am. Dec. 189, Spencer, C. J., laid down the broad rule that, if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. In Latham v. Edgerton, 9 Cowen, 227, Sutherland, J., in regard to a judgment of a court of common pleas, says: 'The principle that a record cannot be impeached by pleading is not applicable to a case like this. The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it.' Citing Mills v. Martin, 19 Johns. 23, he also says (p. 229): 'The plaintiff below might have applied to the court to

set aside their proceedings, but he was not bound to do so. He had a right to lie by until the judgment was set up against him, and then to show that the proceedings were void for want of jurisdiction.' In Davis v. Packard, 6 Wend, 327, 332, in the court of errors, the chancellor, speaking of domestic judgments, says: 'If the jurisdiction of the court is general or unlimited both as to parties and subject-matter, it will be presumed to have had jurisdiction of the cause, unless it appears affirmatively from the record, or by the showing of the party denying the jurisdiction of the court, that some special circumstances existed to oust the court of its jurisdiction in that particular case.' In Bloom v. Burdick, 1 Hill, 130, Bronson, J., says: 'The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in whatever court it was rendered;' and in People v. Cassels, 5 Hill, 164, 168, the same learned judge makes the remark that no court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts upon which jurisdiction depends. In Harrington v. The People, 6 Barb. 607, 610, Paige, J., expresses the opinion that the jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. He repeats the same view in Noyes v. Butler, 6 Barb. 613, 617; and in Hard v. Shipman, id. 621, 623, 624, where he says of superior as well as inferior courts, that the record is never conclusive as to the recital of a jurisdictional fact, and the defendant is always at liberty to show a want of jurisdiction, although the record avers the contrary. If the court had no jurisdiction it had no power to make a record, and the supposed record is not in truth a record. Citing Starbuck v. Murray, 5 Wend. 158; 21 Am. Dec. 172. The language of Gridley, J., in Wright v. Douglass, 10 Barb. 97, 111, is still more in point. He observes: 'It is denied by counsel for the plaintiff that want of jurisdiction can be shown collaterally to defeat a judgment of a court of general jurisdiction. The true rule, however, is that laid down in the opinion just cited (op. of Bronson, J., in Bloom v. Burdick, 1 Hill, 188, 143), that, in a court of general jurisdiction, it is to be presumed that the court has jurisdiction till the contrary appears, but the want of jurisdiction may always be shown by evidence, except in one solitary case,' viz.: 'When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside or reversed by a direct proceeding.'"

Freeman on Judgments, sec. 135: "Jurisdiction being obtained over the person and over the subject-matter, no error in its exercise can make the judgment void. Wimberly v. Hurst, 33 Ill. 166; Cloud v. El Dorado Co. 12 Cal. 128; Ex parte Watkins, 3 Pet. 193; Preston v. Clark, 9 Ga. 246; Blakely v. Calder, 15 N. Y. 621; B. & W. R. R. Co. v. Sparhawk, 1 Allen, 448; Cailleteau v. Ingouf, 14 La. Ann. 623; Bolgiano v. Cooke, 19 Md. 375; Savage v. Hussey, 3 Jones (N. C.), 149; Hathaway v. Hemingway, 20 Conn. 191; Feaster v. Fleming, 56 Ill. 457; Fleming v. Johnson, 26 Ark. 421. A judgment in excess of the amount prayed for in the complaint, or giving relief not asked for in the complaint, is not void. Chase v. Christianson, 41 Cal. 253. The authority to decide being shown, it cannot be divested by being

improperly or incorrectly employed. Error of decision may be corrected, but not so as to reach those who have in good faith relied upon its correctness. Pursley v. Hayes, 22 Iowa, 11. The same rules apply to actions to recover delinquent taxes as in other cases in respect to collateral attacks. Scott v. Pleasants, 21 Ark. 364; Eitel v. Foote, 39 Cal. 439; Wellshear v. Kelley, 69 Mo. 343; Graceland C. Co. v. People, 92 Ill. 619. It cannot be shown, to avoid the effect of such judgments, that the taxes were previously paid. Cadmus v. Jackson, 52 Pa. St. 295. Neither will such judgment be any the less effective because it appears from the judgment roll that the assessment was illegal and void. Mayo v. Ah Loy, 32 Cal. 477; Mayo v. Foley, 40 Cal. 281; Jones v. Gillis, 45 Cal. 541; Anderson v. Rider, 46 Cal. 134. A statute of the state of Missouri authorized a statutory foreclosure of mortgages and a judgment for the sale of the premises, and a personal judgment against the mortgagor. A court of general jurisdiction at law and in equity, proceeding under this statute, rendered against the vendee of the mortgagor a foreclosure and also a personal judgment. This personal judgment, in an elaborate opinion, was held to be void on the ground that, in addition to having jurisdiction over the subject-matter and of the person, the court must be authorized to give the kind of relief which its judgment assumes to grant. Fithian v. Monks, 43 Mo. 502." The learned writer quoted from says, in a note, that the cases of Mayo v. Ah Loy, Mayo v. Foley, Jones v. Gillis, and Anderson v. Rider, *supra*, seem to be "irreconcilable with a portion of the opinion in the case of Reily v. Lancaster, 39 Cal. 354. In Mayo v. Ah Loy the court said that, while a tax imposed on property on I street to pay for improving J street would be unauthorized and invalid, yet if such a tax were assessed, and a suit begun for its collection, a judgment in favor of the plaintiff, if the court had jurisdiction, would be valid. In the case of Mayo v. Foley it appeared from the record that several lots had been assessed in gross, and that a judgment by default had been rendered in a suit upon such assessment. The assessment was conceded to be invalid; but its want of validity was held not to affect the judgment rendered to enforce it. But in Reily v. Lancaster it appeared from the complaint in the record that the tax was levied and assessed by virtue of a certain act of the legislature. This act was unconstitutional. The court decided that the judgment and the sale thereunder were void. Why and upon what principles a person sued for a tax levied by virtue of an unconstitutional law may suffer judgment to be entered against him without affecting his rights is not explained. This action was brought in a court of general jurisdiction. The court had authority to determine whether the tax was levied under a constitutional law. By rendering judgment for plaintiff it affirmed the validity of the tax and of the law. Why was this judgment *coram non judice*? If not *coram non judice*, why was it void? The court had jurisdiction of the subject-matter and of the parties. Its decision was erroneous, but not more so than the judgments in question in the cases of Mayo v. Ah Loy and Mayo v. Foley."

Pennoyer v. Neff, 95 U. S. 732: "In several of the cases the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the state in which it is rendered, implying that in such state it may be valid and binding. But if the court has

no jurisdiction over the person of the defendant by reason of his non-residence, and consequently no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,— it is difficult to see how the judgment can legitimately have any force within the state. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the state where rendered, and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any state of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the state where rendered. Smith v. McCutchen, 38 Mo. 415; Darrance v. Preston, 18 Iowa, 396; Hakes v. Shupe, 27 id. 465; Mitchell's Administrator v. Gray, 18 Ind. 128."

CHAPTER VII.

OF THE SERVICE OF PROCESS BY PUBLICATION.

Publication; service by — Notice need not convey intelligence to the defendant — Publication supported by affidavit of facts shown — Return of "not found" . . . . . § 51
How order is obtained — Where defendant is not known . . . 52
Death before publication is completed — Want of service destroys jurisdiction 53
Care in service required 54
Publication only warrants judgment *in rem* — Nature of judgment by publication 55
Judgment only affects *status* in divorce — Publication; effect of on judgment 56
Judgment under, binds *res* only 57

§ 51. Service by publication.— In nearly all the states the statutes provide a method of service upon non-resident and absconding debtors, known as service by publication. This mode of service is called constructive; not because the publication in the manner prescribed raises any reasonable presumption that the defendant is advised of the pendency of the action, for its authorization is not confined to cases where there is a possibility of its ever coming to the knowledge of the party liable to be affected thereby. The defendant may have removed beyond the reach of knowledge of the fact of publication as made, and be at such a distance that it would be impossible for him to reach the place of trial before the day fixed for the return of the process. This method of service depends for its validity more upon strictly conforming to the statute which authorizes it than upon any inherent probability of its giving notice of the pendency of the suit to the party affected; and the fact of knowledge on the part of the defendant cannot be shown to supply any defect in the publication or in the proceedings anterior to it.[1]

This method, being in derogation of the common law, is also strictly construed by the court. It is made use of in cases brought where property within the state is attached, and for

[1] Pomeroy v. Betts, 31 Mo. 419.

the foreclosure of mortgages and liens upon real estate; also in quieting titles in actions that are local in their character, and is frequently resorted to in actions for divorce. In some of the states where service can be thus made, the statute requires an affidavit showing that personal service cannot be made upon the defendant, and such allegations should distinctly and unequivocally show the existence of the state of facts giving the court jurisdiction to make the order of publication.[1] In other states the affidavit need only show that personal service cannot be made upon the defendant within the jurisdiction; in others the petition must show the facts authorizing the publication and invocation of jurisdiction *in rem*, and the affidavit the inability of the plaintiff to make personal service within the state.[2] The petition, affidavit or proceedings, as the case may be, must also aver the cause of action against the defendant and its nature.[3] In some states the statute requires that where the defendant's property has been attached in the suit the proceedings must show that the attachment was issued. The petition or affidavit usually shows the jurisdictional facts on which the suit is founded. In some states the affidavit is required to show diligence on the part of the plaintiff to procure service on the defendant.[4]

[1] Wade on Notice, sec. 1048: "Where there is a judgment by default, execution and sale of real estate, pursuant to a published notice, a subsequent grantee of the debtor in the execution cannot, in a collateral proceeding, show the falsity of the affidavit upon which the order of publication was founded, in order to impeach the validity of the judgment, execution and sheriff's deed. Ogden v. Walters, 12 Kan. 282."

[2] Wade on Notice, sec. 1059: "Where the object of the suit is the foreclosure of a mortgage or the partition of real estate, the property to be affected should be correctly described, and with sufficient certainty to leave no room for doubt as to the particular parcel or parcels intended." Lawler v. Whetts, 1 Handy, 89.

[3] Wade on Notice, sec. 1063: "The notice should also name the day, with reasonable certainty, upon which the defendant so served with process is required to appear and answer, and the order should direct the time for which the publication is to be made. It was accordingly held, where a subpœna in chancery, served by publication, was dated 'March 2, 1860,' requiring appearance on the second Monday of 'March next,' that this would not authorize a decree *pro confesso*." Soule v. Chase, 1 Rob. (N. Y.) 222; Hays v. Lewis, 21 Wis. 663; Elee v. Wait, 28 Ill. 70.

[4] Wade on Notice, secs. 1069, 1070: "It is of the utmost importance that the notice shall be published for the full time required by the statute and directed by the order of the court or

The statute sometimes requires that the notice or summons should be placed in the hands of the sheriff and returned "not found." Where such a requirement is made it must be complied with. Sometimes the statute simply requires that it should appear by affidavit to the satisfaction of the court or proper officer making the order of publication that personal service cannot be had within the state. Sometimes the averment that the defendant cannot with due diligence be found within the state is required. Whatever the allegations may be, the jurisdiction is dependent entirely upon the statute providing for the publication; and where an affidavit complies with it, the facts stated in the affidavit cannot be falsified or impeached in a collateral proceeding.[1]

officer (Hill v. Faison, 27 Tex. 428); that the last insertion shall be a sufficient length of time before the return day (Grewell v. Henderson, 5 Cal. 465); and that such publication shall not commence prior to the date of the order; for until the order is made the publication is unauthorized. In computing the time of publication and the statutory period intervening between the last publication and the return day, the date of the first insertion will be included, for the purpose of determining whether the notice has been published for the full time, and the intervening period will be understood to commence with the day following that on which the time of publication ceases. Mitchell v. Woodson, 37 Miss. 567." The provisions for service by publication in such cases are not unconstitutional. Palmer v. McCormick, 28 Fed. Rep. 541. Under a former statute providing that notice of a proceeding therein referred to should be published for a time not less than "once a week for four consecutive weeks," held, that the notice was completed at the last publication. Banta v. Wood, 32 Iowa, 469. Service by publication being only constructive service provided for by the legislature, and to be resorted to mainly in proceedings *ex parte*, the requirements of the statute must be strictly complied with. Broghill v. Lash, 3 G. Gr. 357. Where a court acquires jurisdiction only by publication, unless publication is made as required by statute no service is obtained, and the proceedings of the court under it are void. Hinch v. Weatherford, 2 G. Gr. 244.

[1] The statute permitting service by publication must be strictly complied with. Hence, in an action to set aside a judgment for want of legal notice, where it is not shown by the record, nor by evidence *aliunde*, that the defendant was a non-resident when the service upon him was attempted, the court will not presume that he was not a resident. Hartley v. Boynton, 5 McCrary, 453; Bradley v. Jamison, 46 Iowa, 68; Bardsley v. Hines, 33 Iowa, 157. But a judgment upon service by publication cannot be attacked in a collateral proceeding for mere insufficiency in the notice or service, if the court has held it sufficient. Gregg v. Thompson, 17 Iowa, 107. The determination of a court that proof of service by publication is sufficient cannot be questioned in a collateral proceeding

§ 52. Order for publication.— As to who should make the order of publication depends entirely upon the statute by which it is authorized, and these statutes are so numerous and diverse in their character that we cannot mention them in detail; the reader is referred to the statutes of his own state upon this subject. We may, however, remark that in general the order of publication is made by the court in which the suit is pending, or by the judge or officer of the court authorized to make it, and in this respect the order must comply with the statute. Sometimes the statute requires that such notice shall be given by publication, and authorizes it in proceedings *in rem*, as the court may direct. In each case the court should make the necessary order for publication and fix the time of publication, and time for appearance of the defendant. Where the proceedings are for foreclosure of a mortgage, or for the partition of real estate, the foreclosure of vendors' liens, the quieting of title, or any proceeding affecting real property, where the action is local and *lis pendens*, the description of the property affected thereby should be set forth, or such reference given to it as will give notice to the party defendant of the nature of the action or proceeding before the court.[1]

to set aside the sheriff's deed executed to the purchaser at a sale under a judgment recovered on service by publication only. Fanning v. Krapfl, 68 Iowa, 244. Under the same statute, held, that the fact that the affidavit for publication was made by plaintiff's attorney, which did not explain affiant's want of knowledge, or why it was not made by plaintiff, was not a ground for attacking collaterally a judgment rendered on such publication. Banta v. Wood, 32 Iowa, 469; Byrne v. Roberts, 31 Iowa, 319. Where the affidavit stated that the defendant could not "with due diligence be found within the state," it was not held defective for failing to allege with particularity what efforts had been made to find him within the state. Sueterlee v. Sir, 25 Wis. 357. The statutes of the different states vary materially with respect to the affidavit. In some of them the allegation of non-residence is not sufficient without the further statement that the defendant could not be found within the state, while in others it seems sufficient to state that defendant is not a resident of the state.

[1] Wade on Notice, sec. 1030: "As this manner of serving process depends for its validity more upon its strict conformity to the statute by which it is authorized than upon any inherent probability of its conveying intelligence of the impending suit to the party whose rights are to be affected, the fact that it has actually come to the knowledge of defendant cannot be shown to supply any material deviation in the publication from what the statute prescribes. The statute, being in derogation of common law, is always strictly con-

And sometimes where the defendant is unknown, or where his name is unknown, the *res* is made a party defendant by description; but where the defendant is known his name should be correctly stated. The order should also be properly signed. In short, the provisions of the statute must be strictly complied with. If the order requires the publication to be made in a particular newspaper, it must be made therein. And nothing is more important to give jurisdiction than that the notice be published for the full period of time directed by the order of the court or officer, and that its last publication shall be a sufficient length of time before the return day as provided by the statute. In computing the time of publication the statutory period intervening between the last publication and the return day will include the date of the first publication; as, where the statute requires publication for three consecutive weeks, it has been held to be sufficiently complied with by three weeks' publication prior to the time fixed for the hearing.[1]

§ 53. Death, effect of.— When an order of publication is made and the defendant dies before the publication is completed the court acquires no jurisdiction.[2] The summons and

strued, and it must be shown affirmatively that its provisions have been complied with. Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Likens v. McCormick, 39 Wis. 313." An action to foreclose a mortgage is notice to the world of the rights of the mortgagee in the mortgaged premises. Knowles v. Rablin, 20 Iowa, 101; Sowden v. Craig, 26 Iowa, 156; Cooley v. Brayton, 16 Iowa, 10. See O'Brien v. Putney, 55 Iowa, 292; Rider v. Kelso, 53 Iowa, 367; Shropshire v. Lyle, 31 Fed. Rep. 694.

[1] Wade on Notice, sec. 1032: "The first essential requisite to a valid publication of original process is the affidavit, return, or declaration upon which the order is based. The allegations should be distinct and unequivocal, and should show the existence of a state of facts such as would give the court or judge jurisdiction to order the publication. Bardsley v. Hines, 33 Iowa, 157; Merrill v. Montgomery, 25 Mich. 73; Schell v. Leland, 45 Mo. 289. In Guise v. Early, 72 Iowa, 285, it is said: "Actions are authorized by our statute to be brought against unknown defendants. But the provisions are not shown to have been followed in the proceedings, especially the requirements that the petition shall be sworn to, the notice shall be approved by the court before it is published, and the publication shall be ordered by the court in a newspaper therein designated. These provisions not having been complied with, the court acquired no jurisdiction of the unknown defendants." See § 53, note 4.

[2] If the party upon whom the service is being made dies before it is complete — that is, before the required publications have been made — the

proof of the same are parts of the record and should appear; and their absence raises a presumption of want of jurisdiction.[1]

As we have before said, where the service of notice or an order of publication or want of proper service appears, the jurisdiction is *prima facie* overthrown.[2]

The proof of service must be made as provided by the statute, and if it requires it to be made by the affidavit of the plaintiff, it is insufficient if made by the foreman or publisher.[3]

If the practitioner will adopt the rule that a strict compliance with the statute is necessary, he will stand on solid ground and will be safe; and no other rule can be safely relied upon in following this method of service.

It will be found in all cases where the courts have held service by publication, not conforming to the statutes, sufficient, the notice was not in fact jurisdictional, but that the defects related to the omission of some unnecessary words.[4]

§ 54. Care in service.— The careful attorney will look to every requirement of the statute pertaining to jurisdiction. Each provision has some good reason for its being, and should be observed where there is no appearance by the defendant, in whatever form the action may be, whether attachment proceedings or proceedings affecting realty.

Where attorneys are employed to institute and prosecute actions *in rem*, they are quite too apt to rely on their recollection of the statute, or forget to obtain the necessary formal order for publication, or neglect to set forth by affidavit the

service cannot be completed, there being no person in being upon whom to make it; and whatever has been done, short of complete service, is of no avail, and the court acquires no jurisdiction through it. Auerbach v. Maynard, 26 Minn. 421.

[1] Dronillard v. Whistler, 29 Ind. 552; Claypoole v. Houston, 12 Kans. 324.

[2] Easterbrook v. Easterbrook, 64 Barb. 421. See, also, Waffle v. Goble, 53 Barb. 517; Spiers v. Halstead, 71 N. C. 209; Claypoole v. Houston, 12 Kans. 324; Braly v. Seaman, 30 Cal. 610; Riley v. Nichols, 1 Heisk. (Tenn.) 16; Drake v. Hale, 38 Mo. 346.

[3] Ellsworth v. Cordrey, 63 Iowa, 678: "It appears from an affidavit made by the publisher of the Wright County Monitor, a newspaper published in Wright county, that a notice was published in that paper. We have held that the affidavit of the proprietor of a newspaper, that the publication was made, is not a compliance with section 894 of the code. American Missionary Association v. Smith, 59 Iowa, 704."

[4] See § 44, note 1, p. 121.

essential requisites for obtaining such service, to make it obligatory on the defendant to appear, and he usually does not appear. They obtain without difficulty the judgment or decree, sell the property, and their client or a stranger purchases it. The property becomes valuable, and the owner, or some one desiring it, looks it up, takes advice, and the record shows no order for publication, no preliminary showing or affidavit of the non-residence of the defendant, or no sufficient statutory proof of the publication, and the jurisdiction has failed.[1]

§ 55. General remarks.— While it is impossible to go over the great variety of provisions that the different legislatures have made touching the method of acquiring jurisdiction of the defendant, some of which are quite unique, the fact still exists that there must be some effort made to procure service, either by posting information concerning the action in some public place or mailing it to the last known address of the defendant after the attachment has issued or the publication has been made. It is essential that provisions of this nature be carefully observed. It must be remarked that this process only supports a judgment that is rendered against the property. Whatever may be its form, it does not warrant a personal judgment against the party defendant, and such a judgment is of no validity anywhere beyond the *res*, as we shall presently show.[2] Such judgments are only good in the state where rendered and against the property in the custody of the court, or *res* located there and made the subject of the jurisdiction; but beyond the thing they are not binding, but are binding as to the *res* everywhere, when formal and founded on statutory service. While under the laws of some states they are held good as to other property within the jurisdic-

[1] See § 44, notes p. 118; also §§ 45, 46, 47, 48, and general note at end of chapter VI.

[2] The legislature cannot by any enactment confer upon the courts of the state jurisdiction over the person of a citizen of another state. But see Weil v. Lowenthal, 10 Iowa, 575; Darrance v. Preston, 18 Iowa, 396; Melthop v. Doane, 31 Iowa, 397; Bates v. C. & N. W. R. Co. 19 Iowa, 260; Hakes v. Shupe, 27 Iowa, 465; Lutz v. Kelly, 47 Iowa, 307; Kilburn v. Woodworth, 5 Johns. 37; Shumway v. Stillman, 6 Wend. 447; Mills v. Duryee, 7 Cranch, 481; Borden v. Fitch, 15 Johns. 140; Andrews v. Montgomery, 19 Johns. 162; Bissell v. Briggs, 9 Mass. 462; Aldrich v. Kinney, 4 Conn. 380. See notes to §§ 44, 49 and 50.

tion, such view has been very thoroughly shaken, and the better rule is that they are not binding as personal judgments within the state.

§ 56. Effect and nature of the judgment.— It is important to consider the nature of judgments obtained after and by virtue of service by publication. We think they only condemn and affect the property before the court. The causes for this view arise not only from the fact that the defendant is only constructively before the court, but from the proceeding itself. The defendant has left property that is attached or seized and which the plaintiff claims the right to sequestrate because of defendant's indebtedness; property in which plaintiff claims an interest; property that is in its nature local and present in the jurisdiction, or that is immovable; property that plaintiff has a lien upon; property that is in dispute as to the right or title that should be quieted, or carries with him or her a *status* that the plaintiff claims should be changed and that is attached to the plaintiff and is present with him or her; that the law says may be removed or modified under the circumstances of the case as against the plaintiff, and over which the court has been given jurisdiction. In such matters the court has been given the right to sell, dispose of, and subject the property to the payment of the debt or lien, quiet the title, destroy, modify or change the *status* by plaintiff giving notice by publication or constructive service; but beyond that it does not go, and beyond this the jurisdiction ceases.[1]

No common-law judgment can be rendered on service by publication or by constructive service unless defendant appears or is personally served within the jurisdiction.[2] This being true, the court cannot do indirectly what it cannot do directly — affect rights of a non-resident by the *rem* proceeding and lay hold of other property in the state not under the control of the court. Legislation granting such power is in excess of the power of the state itself, whose jurisdiction is confined to its boundaries, and cannot be exercised against persons outside of its limits and beyond the jurisdiction of its courts.

[1] See chapter VI, general note at end, and § 45 and notes.

[2] Fox v. Reynolds, 50 Md. 572; § 45, note 2, p. 128.

§ 57. Judgment binds res.— If, therefore, a chip, a hat, a pocket-knife or some trifling article is attached, the court holding such article by its officers cannot in condemning it enter a personal judgment binding on the defendant so as to authorize the seizure of other property not attached, for such seizure can only be made where a personal judgment can be rendered.[1]

[1] Sec. 45, p. 129; also general note at the end of chapter VI; Pennoyer v. Neff, 95 U. S. 724: After quoting from Picquet v. Swan, 5 Mason, 35, the court quotes from Boswell's Lessee v. Otis, 9 How. 336: "'Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*.' These citations are not made as authoritative expositions of the law, for the language was perhaps not essential to the decisions of the cases in which it was used, but as expressions of the opinions of eminent jurists. But in Cooper v. Reynolds, reported in the 10th of Wallace, it was essential to the disposition of the case to declare the effect of a personal action against an absent party, without the jurisdiction of the court, not served with process, or voluntarily submitting to the tribunal when it was sought to subject his property to the payment of a demand of a resident complainant; and in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions and the jurisdiction of the court over them. In that case the action was for damages for alleged false imprisonment of the plaintiff; and, upon his affidavit that the defendants had fled from the state, or had absconded or concealed themselves so that the ordinary process of law could not reach them, a writ of attachment was sued out against their property. Publication was ordered by the court, giving notice to them to appear and plead, answer or demur, or that the action would be taken as confessed and proceeded in *ex parte* as to them. Publication was had, but they made default and judgment was entered against them and the attached property was sold under it. The purchaser having been put into possession of the property, the original owner brought ejectment for its recovery. In considering the character of the proceeding the court, speaking through Mr. Justice Miller, said: 'Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and subject his property lying within the territorial jurisdiction of the court to the payment of that demand. But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within the territorial jurisdiction and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied

When we discuss proceedings *in rem* this matter will be more fully considered, but for the present we will let the subject rest by saying that the judgment rendered pursuant to proceedings instituted by publication, when the defendant does not appear, extends only to the thing actually before the court and held by its process or under its control, such as the title to or interest in realty in the state where a lien exists or there is some right affecting or growing out of immovable property that is within the jurisdiction.

on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case whether he appear or not. If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case and deprives the court of further jurisdiction, though the publication may have been duly made and proved in court.'"

CHAPTER VIII.

JURISDICTION IN REM.

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Judgment against *res;* its nature *in rem* — Actions *in personam* and *rem;* distinction between — The *status* of a person; a thing in law — Marine torts; proceedings *in rem* — Jurisdiction by seizure — Death does not affect action *in rem* 59

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§ 58. Proceedings in rem — Introductory — Their nature.— Law is a rule of civil or political conduct emanating from the supreme power of the state, or adopted by common consent, founded upon the rule of justice and right, for the regulation of the conduct of the citizens of the state, as between themselves and the government, and in their intercourse with each other. The sovereignty or the state controls the actions and conduct of each individual within its dominion. It also redresses the wrongs of individuals against its citizens, and controls the property within its dominion, whether that property be real or personal, and irrespective of the residence of the owner. Therefore, where a contract has been violated, where indebtedness has accrued, and where injury has been done by which a liability has been created, the law will lay its hands by suit on the property of the person who is indebted or who is liable to the civil action, where such property is within the territorial jurisdiction of the state, and subject it to the payment of the indebtedness of the owner, by a proceeding *in rem*, within the state, as if the owner resided there.

Aside from that, the statute of the state often renders the property of the owner liable to forfeiture because of injury or wrong caused by the unlawful use of it. In such proceedings the property is known in law as things guilty. They consist of such things as are used in the commission of crime, or for an unlawful purpose, that the statutes of the states have declared to be the subject of forfeiture when illegally used; but the forfeiture is not dependent upon the fact that the owner so used them, for if they were so used by the custodian they are

subject to condemnation, even where the owner did not assist in or assent to such use.[1]

There is also another class of property known in law as things hostile. This class is, in fiction of law, defined as those things known as contraband of war, that may be used by a public enemy, or that will aid or comfort an enemy; and in such cases the law forfeits this class of property as things hostile to the sovereignty of the state by a proceeding *in rem* against it under the statute.

By far the greater class of actions coming within the jurisdiction of proceedings *in rem* consists of things liable to be taken for the indebtedness of the owner, or because of a lien

[1] Judge Story says: "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offense be *malum prohibitum* or *malum in se*." The Palmyra, 12 Wheat. 14. United States v. Brig Malek Adhel, 2 How. 233: "The doctrine, also, is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs. In the case of The United States v. The Schooner Little Charles, 1 Brock. 347, 354, a case arising under the embargo laws, the same argument which has been addressed to us was upon that occasion addressed to Mr. Chief Justice Marshall. The learned judge, in reply, said: 'This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offense. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master.' . . . The same doctrine has been fully recognized in the high court of admiralty in England, as is sufficiently apparent from The Vrouw Judith, 1 Rob. 150; The Adonis, 5 Rob. 256; The Mars, 6 Rob. 87; and indeed in many other cases where the owner of the ship has been held bound by the acts of the master, whether he was ignorant thereof or not. See 3 Wheaton's Reports, Appendix, pp. 37 to 40." Dobbins v. United States, 96 U. S. 400; Steamer Webb, 14 Wall. 406; Coffey v. United States, 116 U. S. 443; Lilienthal's Tobacco v. United States, 97 U. S. 267; Friedenstein v. United States, 125 U. S. 231; Origet v. United States, 125 U. S. 243; The Porpoise, 2 Curtis C. C. 310; Barnacoat v. United States, 1 Met. 225; United States v. La Vengeance, 3 Dall. 297; State v. Barrels of Liquor, 47 N. H. 374.

created, either by process of law against them or by the voluntary act of the owner himself or his assignor.

The law also makes provision for settling the right to, and ownership of, the property within the jurisdiction of the state. Things are also chargeable for the taxes levied by the government against the owner, or against the things themselves, for the support and protection that is afforded by the government itself.[1]

Inasmuch as death is constantly occurring, there results from it the constant change of title to property, both real and personal, within the state. The deceased may or may not have been a citizen of the state in which he died. If he was indebted to a citizen or resident thereof, the law, for the purpose of settling such estates, has prescribed a procedure for probating wills, administering and closing the estates of decedents. This proceeding may be regarded as exclusively *in rem*, even although every person who inherited the estate or acquired it by a will of the owner may be a citizen of the state. Still there may be creditors who are non-residents of the state interested therein; as, the owner may be a minor to whom the property by law descended, or may be unknown. Therefore the law takes charge of the estate, by probate proceedings instituted for that purpose, in order to settle the rights, distribute the property, quiet the title and liquidate the indebtedness of the decedent; doing and performing all requisite and necessary acts essential to closing the estate and removing the unrest caused by the death of its late owner.

[1] Jecker et al. v. Montgomery, 18 How. 116: "And in this connection it may be observed that the bare permission by the owners of the use of their vessel in hostile or piratical enterprises renders such vessels liable to capture and condemnation equally with her employment in similar offenses under the immediate command of such owners themselves. *Vide* the case of United States v. The Brig Malek Adhel, 2 How. 234; United States v. The Schooner Little Charles, 1 Brock. Rep. 347." Waples' Proceedings in Rem, sec. 300: "What are contraband goods? All implements and munitions of war; all articles used or destined for hostile purposes; all money, naval or army stores and provisions for use in war. It would be a long list should an inventory be made of all contraband articles; but it may serve to name ships of war, cannon, muskets, fire-arms of every description, gunpowder, saltpetre, gun carriages, ammunition wagons and war-horses; and also pitch, tar, hemp, sail-cloth, cordage, rigging, anchors, masts, rudders, spars, sails, etc., if destined for enemy use. There

There is also another class of property, that may be owned by persons *non compos mentis*, or minors, or persons laboring under disability, or persons insane, spendthrifts, habitual drunkards, and those possessing weak minds. The property of these the law takes charge of, through proper courts, for the protection of such persons and their property as are thus unable to protect themselves, as well as for the protection of the state and to prevent them from becoming a public charge.

Jurisdiction of the *res* is obtained by seizure under process, whereby it is held to abide such orders as may be made by the court concerning the property seized.[1]

has not been perfect agreement among the civilians concerning what is always necessarily contraband, but the foregoing specifications may be fairly deduced from their discussions as being clearly within the class. Bynkershoek (2 J. P.), Lib. i, ch. 10; Pothier's Traite de Propriete, n. 104; 2 Valin Com. Lib. 3, tit. 9, art. 11, p. 264; Vattel, Lib. 3, ch. 7, sec. 112; Heineccius de Navibus, ch. 1, sec. 14; Grotius de Jure, Lib. 3, ch. 1, sec. 5; Loccenius de Jure Marit. Lib. 1, cap. 4, sec. 9. The destined use for war purposes may be inferred from the destination of a vessel bearing the goods. The Staadt Embden, 1 Rob. 26; The Sarah Christina, id. 241; The Maria, id. 372; The Apollo, 4 Rob. 158; The Christina Maria, 4 Rob. 166; The Twee Juffrowen, id. 244; The Evert, id. 354; The Commercen, 1 Wheat. 382. Though a vessel, with provisions or other contraband articles on board — contraband if destined for enemy use — may be ostensibly bound for a friendly port, yet, if that port be near one of the enemy, and the goods easily transshipable to the enemy, and circumstances warrant the conviction that they are destined for enemy use, they are confiscable as contraband of war. This principle, we think, is clearly deducible from, if not plainly asserted in, several decisions. Maisonnaire v. Keating, 2 Gall. 335; The Commercen, 1 Wheat. 382; The Jonge Margaretha, 1 Rob. 189; The Haabet, 2 Rob. 182; The Edward, 4 Rob. 68; The Zelden Rust, 6 Rob. 93; The Ranger, id. 126; 2 Wheat. Int. Law, 195 *et seq.*"

[1] Cross v. Armstrong, 44 Ohio St. 623: "'*In rem*' is understood to be a technical term, taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms *in rem* and *in personam* always being the opposite, one of the other; an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specific person, but against or with reference to a specific thing, and so against whom it might concern, or 'all the world.' A proceeding brought to determine the *status* of the thing itself, the particular thing, and which is confined to the subject-matter *in specie*, is *in rem*, the judgment being intended to determine the state or condition, and, *ipso facto*, to render the thing what the judgment declares it to be; while a proceeding which seeks the recovery of a personal judgment is *in personam*. In the former, process may be served on the thing itself, and by such service and mak-

§ 59. Definitions.— The word *res* indicates a thing or things; any object of value that may be possessed, seized or attached, or a right, *status* or chose in action.

A proceeding *in rem* is a proceeding to determine the *status* of the particular thing itself, and which is confined to the subject-matter *in specie* in the *rem*. The judgment determines the state or condition, and, *ipso facto*, renders the thing what the judgment declares it to be, binding the thing against the world by the *status* fixed by the judgment.[1]

The distinction between actions *in personam* and proceedings *in rem* is this: The first is an adversary proceeding against some person or persons who are made defendants. The second is against some particular thing and so against whom it may concern —"all the world."[2]

ing proclamation the court is authorized to decide upon it without other notice to persons, all the world being parties; while in the latter, in order to give the court power to adjudge, there must be service upon those whose rights are sought to be affected. As regards rights, the terms signify the antithesis of 'available against a particular person' and 'available against the world at large.' Thus, '*jura in personam* are rights primarily available against specific persons, *jura in rem* rights only available against the world at large.' Beyond this, a judgment or decree is *in rem*, or in the nature of a judgment *in rem*, when it binds third persons — such as the sentence of a court of admiralty on a question of prize, or a decree of other courts upon the personal *status* or relation of the party, such as dissolution of marriage contract, bastardy, etc., a decree in probate court admitting a will to probate and record, granting administration, etc., or a decree of a court of a foreign country as to the *status* of a person domiciled there."

[1] Cooper v. Reynolds, 10 Wall. 316: "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. . . . Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause. . . . So, also, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court."

[2] Page 161, n. 1. The probate of a will is in the nature of a proceeding *in rem*. Gaines v. Fuentes et al. 92

In addition to those actions *in rem*, or rather different characters of actions, named in the preceding section, are also undivided suits to obtain a sentence, judgment or decree upon the personal *status* of a subject who is an actual citizen or resident of the state, when some other holds a legal *status* or relation to him or her that for cause ought to be dissolved; such as rights acquired by marriage, rights arising from slavery (now obsolete in this country), proceedings in bastardy, and the like.[1]

U. S. 21. Freeman v. Alderson, 119 U. S. 187: "Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claim asserted by the libelants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties. The state has jurisdiction over property within its limits owned by non-residents, and may therefore subject it to the payment of demands against them of its own citizens. It is only in virtue of its jurisdiction over the property, as we said on a former occasion, that its tribunals can inquire into the non-resident's obligations to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the non-resident possesses no property in the state, there is nothing upon which its tribunal can act. Pennoyer v. Neff, 95 U. S. 714, 723. They cannot determine the validity of any demand beyond that which is satisfied by the property. For any further adjudication the defendant must be personally served with citation or voluntarily appear in the action."

[1] 2 Bishop on Mar. and Div. (4th ed.) § 141: "The exclusive right, therefore, of each state to determine the matrimonial *status* of persons domiciled within it, gives its tribunals exclusive jurisdiction over divorce causes between them. In the

Marine torts are in the nature of trespass upon the person or upon personal property, and courts have jurisdiction over them in actions *in personam* in the jurisdiction where the offending party resides, or *in rem* where the offending thing is found within the jurisdiction of the court.

Actions *in rem* may be also instituted to enforce a right to things that have been arrested or seized, to affect a marine privilege or lien attached to the vessel or cargo, or both, and in which the thing held responsible is proceeded against as the real offending party.[1]

The proceeding to enforce the payment of a debt or demand, or any chose in action, by attachment against the defendant's property partakes in its nature and character of a proceeding *in rem* and also of an action *in personam*. So far as the seiz-

language of Judge Story: 'The doctrine now firmly established in America upon the subject of divorce is that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper court to decree a divorce for any cause allowed by the local law; without any reference to the law of the place of the original marriage, or to the place where the offense for which the divorce is allowed was committed.' Story, Confl. Laws, sec. 230*a;* Harding v. Alden, 9 Greenl. 140; Tolen v. Tolen, 2 Blackf. 407; Wall v. Williamson, 8 Ala. 48; Wall v. Williams, 11 Ala. 826; Hanover v. Turner, 14 Mass. 227; Fellows v. Fellows, 8 N. H. 160; Barber v. Root, 10 Mass. 260; Pawling v. Bird, 13 Johns. 192; Pomeroy v. Wells, 8 Paige, 406; Jackson v. Jackson, 1 Johns. 424; Freeman v. Freeman, 3 West. Law Jour. 475; Maguire v. Maguire, 7 Dana, 181; Harrison v. Harrison, 19 Ala. 499. This doctrine has forced its way through many a field of conflict; and, though its authority is fully acknowledged in the United States, it is hardly so either in England or Scotland."

[1] Grignon's Lessee v. Astor, 2 How. 338: "This is the line which denies jurisdiction and its exercise in cases *in personam:* where there are adverse parties, the court must have power over the subject-matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land (11 S. & R. 432); they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing — the subject-matter before them — without regard to the persons who may have an interest in it; all the world are parties. In the orphans' court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate; a purchaser claims not their title but one paramount. 11 S. & R. 426. The estate passes to him by operation of law. 11 S. & R. 428. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties (11 S. & R. 429), which divests the title of the deceased. 11 S. & R. 430."

ure of the property is concerned, against things indebted, it partakes of a proceeding *in rem*. If, however, the defendant is served within the jurisdiction, or appears, the proceeding is in the nature of a personal action; but in the absence of service as above stated, or appearance of the defendant, it then becomes, on service by publication, a proceeding purely *in rem*, and the judgment binds the attached property only. Seizure by process gives jurisdiction, and supports a valid levy, judgment, sale and deed or transfer, that concludes all persons.[1]

The better rule is that proceedings *in rem* are not affected by the death of the claimant of the property seized; nor is it necessary to make the heirs of the claimant parties; and although the claimant appears in the action and files a bond for the release of the *res*, the action still remains purely *in rem*, although the value as allowed upon the claimant's bond against his sureties is in form *in personam*, and the action may terminate in a judgment against them. The summary remedy will not be embarrassed by the death of a party or any other incident that might cause delay in an action *in personam*.[2]

[1] See § 59*a*, p. 167, n. 1; Pennoyer v. Neff, 95 U. S. 734; Brigham v. Fayerweather, 140 Mass. 413–14.

[2] Is a libel *in rem* against a vessel or other property in the admiralty court converted into a proceeding *in personam* by the giving of a claimant's bond for all the property libeled and appearance and defense by the defendant? The question stated may be considered as fairly arising whenever, after the intervention of a claimant in a proceeding *in rem*, he or one of his sureties shall die pending the hearing of the cause. What notice need be taken of such death? These questions were presented in the early case of Penhallow v. Doane, 3 Dallas, 54. During the Revolutionary war a vessel had been captured by another cruising under congressional authority, and had been libeled as prize in a colonial court, and after Doane had appeared as claimant she had been condemned as prize. Doane presented an appeal to the appellate court, in which, in 1783, the sentence of the lower court was reversed, and the property was ordered to be restored; but before this judgment was rendered in favor of Doane he was, in fact, dead. After the creation of the federal courts Doane's representatives brought suit upon the judgment, when it was objected that the decree in Doane's favor was void because he was then dead, and before his claim had abated. Elaborate opinions were given in the case by several of the justices of the supreme court, three of whom agreed that the death of Doane did not abate the proceedings in the suit *in rem*. In The James A. Wright, 10 Blatch. 160, substantially the same questions arose, though in a different form, inasmuch as the decree in this case had been pronounced after the death of the claimant, but against him. The case was a libel *in rem* against a

§ 59a. Actions in rem.—Actions *in rem*, strictly considered, are proceedings solely against the property, like the seizure of a thing guilty or a thing hostile, or against a thing to subject it to the payment of a tax, duty or statutory lien, when a forfeiture of the thing is sought by reason of a wrong of commission or omission, such as seizure and proceedings for the violation of internal revenue statutes, or customs duties arising from smuggling, and various marine torts, for which property may be condemned. It also arises in actions in

vessel for tort. The claimant intervened and defended the suit in the usual manner, giving bond for the property, with two sureties. He was dead at the time of the trial, but this fact was not made known to the court. On the hearing in the district court a decree was rendered against the vessel, and an appeal was taken to the circuit court, when, on a trial *de novo*, the fact of the death of the claimant was made known and urged as ground for reversal. The circuit court, by Woodruff, C. J., followed "the declaration of the supreme court in Penhallow v. Doane, that in proceedings *in rem* in admiralty the death of a claimant does not abate the suit nor render a subsequent decree therein erroneous," and said: "All the world must take notice at their peril that condemnation is sought; all having an interest may intervene; and if, by death or otherwise, an interest is transmitted or devolved upon persons not previously entitled to intervene, it is for them to protect their own interest by applying to the court for that purpose. The libelant should not be affected by their neglect." The case of The C. F. Ackerman, 14 Blatch. 360, presents a variation of the question. A decree having been rendered against the libeled vessel, which was not paid by the claimants, the libelants moved for summary judgment against one of the two stipulators in the claimant's bond. To this the stipulator interposed two objections: First, that the libelants had not exhausted their remedies against the claimant, and second, that the other stipulator was dead. The court followed to its logical conclusions the principle that a proceeding *in rem* is notice to all the world, and held that the libelants' right to proceed against the stipulators became perfect upon the rendition of the decree; that this right was not affected by the solvency or insolvency of the claimant, and that each stipulator was bound to respond to the terms of the stipulation, no matter whether others bound with him were living or dead; so judgment was allowed against the survivor. Lane v. Townsend, 1 Ware, 286. The Blanche Page, 16 Blatch. 1: In this case it will be observed that one of the sureties on the claimant's bond had died pending the suit, but no attention was paid to this fact by the court. It is true that the admiralty courts hold that the bond or stipulation given by the plaintiff becomes a substitute for the *res* to such an extent that the court will refuse an application for the reseizure of the *res*. The Palmyra, 12 Wheat. 1; The Union, 4 Blatch. 90; Waples on Proc. in Rem, sec. 81; Roberts on Admiralty, 434; The Union, 4 Blatch. 90; The White Squall, id. 108.

bankruptcy, for the sale is a judicial one and similar to proceedings in probate.[1]

There is, however, a very large class of cases that are not strictly actions *in rem*, but are often spoken of by the courts as actions *quasi in rem*, because, though brought against persons, they only seek to subject the property of such persons to the payment of debts. These cases very frequently arise

[1] Vandewater v. Mills, 19 How. 89: "The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore '*stricti juris*,' and cannot be extended by construction, analogy or inference. 'Analogy,' says Pardessus (Droit Civ., vol. 3, 597), 'cannot afford a decisive argument, because privileges are of strict right. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another.' These principles will be found stated, and fully vindicated by authority, in the cases of The Young Mechanic, 2 Curt. 404, and Kiersage, id. 421. See, also, Harmer v. Bell, 22 E. L. & E. 62." A sale of property by an assignee in bankruptcy is a judicial one. Stevens v. Hauser, 1 Robt. 50; 39 N. Y. 302; Stevens v. Palmer, 10 Bosw. 60. The court having jurisdiction in proceedings in an assignment for the benefit of creditors has authority to determine priority among creditors, and a party objecting to the right of the creditor should make such objection in that proceeding. An order of the court as to the jurisdiction of the property will be an adjudication, binding in a collateral proceeding, although erroneous. Perry v. Murray, 55 Iowa, 416. The sale of real property by an assignee is a judicial sale, and cuts off contingent right of dower in real property. Stidger v. Evans, 64 Iowa, 91. See, also, Rumsay v. Town, 20 Fed. Rep. 558, 565. Wharton on Evidence, section 815: Mr. Smith in his Leading Cases (2 Smith's L. Cas. 662) defines a judgment *in rem* to be 'an adjudication pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose.' See Geyer v. Aguilar, 7 Term Rep. 696; Noell v. Wells, 1 Lev. 235; Allan v. Dunbas, 3 T. R. 125; Philips v. Bury, 2 T. R. 346; The Rio Grande, 23 Wall. 458; Norris' Appeal, 30 Pa. St. 122; Penn. R. v. Pennock, 51 Pa. St. 244; Noble v. Oil Co. 79 Pa. St. 354; Moore v. C., R. I. & P. R. Co. 43 Iowa, 385; Everhart v. Holloway, 55 Iowa, 181.

against persons out of the jurisdiction of the court, so that process cannot be served on them; and by such proceedings mortgages are foreclosed, titles quieted and rights to the property determined. These actions differ materially from strict actions *in rem* in this: that the interest of the defendant is alone sought to be affected, citation to him alone is required, and the judgment is only conclusive between the parties. A sharp distinction is made between the two classes of action — those in their nature partly *in rem* and those of the latter class above referred to; and the student or reader, by considering this distinction, will reconcile much conflicting authority. The cases of the latter class are cited below.[1]

Where, in law, a forfeiture of the *res* arises on account of the improper and illegal use of a thing, sometimes called "a thing guilty" and sometimes "a thing hostile," and by the law the thing becomes subject to forfeiture, the entire title in the thing becomes vested, by operation of law, in the state, and upon its being seized and condemned that title is, by the judgment, confirmed in the state.[2] So the probating of a will

[1] A judgment by attachment in a court of another state is only conclusive that the debt sued on was due to the plaintiff to amount of property attached. Peebles v. Patapsco Co. 77 N. C. 233; Wharton on Conflict of Laws, 204; Phillips on Evidence, 198; Story on Conflict of Laws, 549; D'Arcy v. Ketchum, 11 How. 165; Scott v. Noble, 72 Penn. St. 120; Sheridan v. Ireland, 66 Me. 138; Pennoyer v. Neff, 95 U. S. 714; Windsor v. McVeigh, 93 U. S. 274; Brigham v. Fayerweather, 140 Mass. 413; Freeman v. Alderson, 119 U. S. 187, and numerous authorities previously cited under ch. VI.

[2] Waples' Proc. in Rem. sec. 432: "The title of the condemned land is already vested in the United States, before the district court exercises its jurisdiction to sell it. And all unpresented claims and titles are thus barred. Beloit v. Morgan, 7 Wall. 619, 621, 623; Aurora City v. West, id. 82; Green v. Van Buskirk, id. 139; Cooper v. Reynolds, 10 Wall. 308; The Santa Maria, 10 Wheat. 431; Foster v. Milliner, 50 Barb. 385; Megee v. Beirne, 39 Pa. St. 63, 64; Comparet v. Hanna, 34 Ind. 74, 77, 78; Herreth v. Yandes, id. 102; Danaher v. Prentiss, 22 Wis. 311, 316, 317; White v. Weatherbee, 126 Mass. 450; Butler v. Suffolk Glass Co. id. 512; Caylus v. N. Y. & Kingston R. R. Co. 76 N. Y. 609; Dunham v. Bower, 77 N. Y. 76; Steinbach v. Relief Fire Ins. Co. id. 498; Re Brooklyn, Winfield, etc. R. R. Co. 19 Hun (N. Y.), 314; Robinson v. Marks, id. 325; Re Roberts, 59 How. (N. Y.) Pr. 136; Jex v. Jacob, 7 Abb. N. Cas. (N. Y.) 452; Cooper v. Platt, 45 N. Y. Supr. Ct. 242; Schrauth v. Dry Dock Sav. Bank, 8 Daly (N. Y.), 106; Gordinier's Appeal, 89 Pa. St. 528; Dunham v. Wilfong, 69 Mo. 355; Tutt v. Price, 7 Mo. App. 194; State Bank v. Rude, 23 Kan. 143; Turner v. Allen, 66 Ind.

makes the instrument itself the disposition of the title to the property, subject to the payment of debts, usually provided for in the instrument; but the law makes such indebtedness a charge upon the estate of the devisor. In the first and second instance the issue is, Has the property been so illegally used as to warrant the forfeiture because of its illegal or hostile use? Under the third, Was the will the testamentary act of the testator?[1] The jurisdiction of the court arises in each case out of the necessity for seizure, that places the *jus in res* in its hands for absolute disposition to a new owner. The title vests by the forfeiture or by the probate of the will. The judgment of the court in the exercise of its jurisdiction confirms the title and quiets it as against the world.

The second division of proceedings *in rem*, referred to as things indebted, sometimes called actions *quasi in rem*, is where plaintiff seeks, by the action of the court, to enforce a relative right resting against the *res*, by reason of a lien upon the property, like a mortgage, pledge, or judgment lien; or one arising by statute, enforceable by attachment sometimes, or a lien that intervenes by operation of law, such as subjecting the property of a person to the payment of a mechanic's lien,

252; Rosenmueller v. Lampe, 89 Ill. 212; Lyons v. Cooledge, 89 Ill. 529; Decatur Gas Light Co. v. Howell, 92 Ill. 19; Graceland Cemetery Co. v. People, 92 Ill. 619; Noyes v. Kern, 94 Ill. 521; Trescott v. Barnes, 51 Iowa, 409; Mally v. Mally, 52 id. 654; Thompson v. Myrick, 24 Minn. 4; Nougue v. Clapp, 101 U. S. 551. After the sale, it is either in the United States or the purchaser, says the supreme court; but the sale does not take anything from the former owner—it is the forfeiture which does that; and the decree of condemnation is the pronunciation of the forfeiture. It cannot possibly concern the former owner whether the land is sold or not, after finding that there is nothing left in him, subsequent to the condemnation."

[1] 2 Wharton's Law of Ev. sec. 1245: "To meet the burden of proof thrown under such circumstances upon the actor, it is sufficient if he prove a *prima facie* case. If the proofs of exculpation are in the hands of the opposite side, and the latter does not produce them, the presumption is that they do not exist. Where, however, there is an equipoise of evidence, then the judgment must be against the party attacking. The burden was on him to prove *culpa* or *dolus*, and he has failed to make good his case. Ross v. Hunter, 4 T. R. 33; Ireland v. Livingston, L. R. 5 Eng. & Ir. App. 575; Timson v. Moulton, 3 Cush. 269; Hewlett v. Hewlett, 4 Edw. (N. Y.) Ch. 7; Pollock v. Pollock, 71 N. Y. 137; Horan v. Weiler, 41 Pa. St. 470." Chaffee v. United States, 18 Wall. 516.

or enforcing the payment of taxes, and the like cases. In the cases last referred to, "things indebted," the purpose of the law and the jurisdiction of the court is exercised for and to the purpose of enforcing a sale of the property, and the right is referred to as the *jus ad rem.* The distinction is evident: the one is to settle the title to the property, to the thing itself; the other to enforce the payment of a debt by a sale of the thing. The jurisdiction in the latter class involves a mixed action *in personam* and *in rem.* The establishment of the indebtedness of the owner is in the nature of an action *in personam;* the seizure is *in rem;* the decree against the property subjecting the *res* to sale is *in rem.* The issues involve three propositions: First. Is the owner indebted to the plaintiff? Second. Is the property seized the property of the defendant in the action and subject to condemnation? Third. May the property be subjected to the debt?

There is, however, a class of cases, like actions for divorce, where a *status* exists between the plaintiff and defendant and the jurisdiction arises from citizenship or domicile, in which the state takes jurisdiction through its courts, on application of the party injured, when that *status* has been forfeited for a wrong done by the other party holding a right arising out of the *status* that he or she has forfeited, partaking of the nature of the first class in respect to forfeiture, but of the second class in the nature of the enforcement. There is also a class that includes the settlement of estates, the payment of debts of decedents, the disposition of the property of minors, insane persons, lunatics, spendthrifts and drunkards, where the entire property is brought under the direct control of the court; estates of bankrupts are included, partaking more of the nature of the second class in form but of the first class in jurisdiction and practice. This question will be hereafter referred to.

§ 60. Character of proceedings.— All these proceedings are civil in their character, and the *res* must be proceeded against where the party defendant is out of the jurisdiction of the court, and the proceeding against the thing is known in law as a proceeding *in rem* or a proceeding *quasi in rem.*[1]

[1] Wharton on Evidence, sec. 814: "The decree of a court of admiralty or of exchequer, having jurisdiction internationally, when the proceedings are in *rem*, in cases of collision, prize or forfeiture, has extraterri-

There are certain conditions and means under and by which the *res* is brought under the control of the court:

1. The court must have jurisdiction over the subject-matter and actual dominion over the thing.[1]

2. A petition or information must be filed in a court of competent jurisdiction asking the seizure of the thing, setting forth a right of action against the thing or the owner of the thing attached, and praying for judgment of condemnation or sale for the debt.

3. Notice must be given to the owner of the thing of its seizure and the nature of the proceedings against it, or notice to the world, where the action is purely against the thing.[2]

4. Opportunity for intervention and defense by the owner of the thing must be given.[3]

torial validity, whether the court be foreign or domestic. Stringer v. Ins. Co. L. R. 4 Q. B. 676; Hughs v. Cornelius, T. Ray. 473; Scott v. Shearman, 2 W. Black. 977; Lothian v. Henderson, 3 B. & P. 499; Bernardi v. Motteux, 2 Doug. 575; The Helena, 4 Ch. Rob. 3; Cooke v. Sholl, 5 T. R. 255; Godard v. Gray, L. R. 6 Q. B. 139; Dalglish v. Hodgson, 7 Bing. 504; Bolton v. Gladstone, 5 East, 160; Croudson v. Leonard, 4 Cranch, 434; Peters v. Ins. Co. 3 Sumn. 389; Bradstreet v. Ins. Co. 3 Sumn. 600; Mankin v. Chandler, 2 Brock. 125; Dunham v. Ins. Co. 1 Low. 253; The Vincennes, 3 Ware, 171; French v. Hall, 9 N. H. 137; Whitney v. Walsh, 1 Cush. 29; Dennison v. Hyde, 6 Conn. 508; Grant v. McLachlin, 4 Johns. 34; Gelston v. Hoyt, 13 Johns. 561; 3 Wheat. 246; Street v. Ins. Co. 12 Rich. (S. C.) 13; Duncan v. Stokes, 47 Ga. 593; State v. R. R. 10 Nev. 47. See Brown v. Bridge, 106 Mass. 563. This ubiquity of authority is applied even in cases where the sentence is founded on mistake of law. Imrie v. Castrique, 8 C. B. (N. S.) 405; L. R. 4 H. L. 414; Williams v. Armroyd, 7 Cranch, 423. It is otherwise, however, if the jurisdiction does not appear, or if, in cases where the effort is to make the judgment personal in its operation, there was no personal summons and appearance (Neff v. Pennoyer, 3 Sawyer, 274; Pennoyer v. Neff, 95 U. S. 714; Sheridan v. Ireland, 66 Me. 138) or hearing (Windsor v. McVeigh, 93 U. S. 274; The Griefswald, Swabey, 430; Bradstreet v. Ins. Co. 3 Sumn. 600; Rose v. Himely, 4 Cranch, 241; Slocum v. Wheeler, 1 Conn. 429; Sawyer v. Ins. Co. 12 Mass. 291; Kuehling v. Leberman, 2 Weekly Notes Cases, 616. See Dennison v. Hyde, 6 Conn. 508), or where the judgment was fraudulent (Shand v. Du Buisson, L. R. 18 Eq. 283; Messina v. Petrococchino, L. R. 4 P. C. 144), or where the sentence is outrageously unjust. Id."

[1] See note 3, page 172.

[2] See § 59, note 2.

[3] McVeigh v. The United States, 11 Wall. 267: "In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was

5. A judicial finding of the facts alleged in the information or petition and a judgment of condemnation or sequestration are necessary.[1]

6. The conclusiveness of the decree rests upon the sufficiency of the notice and regularity of the proceedings.[2]

7. The seizure of the property may be by process issued from the court or by its being placed in the custody of some officer of the court or by law under the control of the court.[3]

in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." Calder v. Bull, 3 Dallas, 386; Bonaker v. Evans, 16 Adolphus & Ellis (N. S.), 170; Capel v. Child, 2 Crompton & Jervis, 574; Smith v. Woolfolk, 115 U. S. 149; Sabariego v. Maverick, 124 U. S. 293; Windsor v. McVeigh, 93 U. S. 274; Ex parte Terry, 128 U. S. 307.

[1] Judge Story succinctly stated this proposition when he said: "When property is seized and libeled as forfeited to the government the sole object of the suit is to ascertain whether the seizure be rightful and the forfeiture incurred or not." Gelston v. Hoyt, 3 Wheat. 318. And the supreme court of Maine have stated it as clearly: "A judgment *in rem* is an adjudication upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose. Such adjudication concludes all persons from saying the thing adjudicated upon was not such as is declared by such adjudication." Lord v. Chadbourne, 42 Me. 443. So Mr. Justice Hall, of Vermont, defines it: "A judgment *in rem* I understand to be an adjudication pronounced upon the *status* of some particular subject-matter. . . . It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be." Woodruff v. Taylor, 20 Vt. 73.

[2] Smith, C. J., stated the principle too broadly when he said, in New Orleans, etc. R. Co. v. Hemphill, 35 Miss. 24: "As a general principle, notice, either actual or constructive, to the party affected by the judgment of any court, is essential to its validity; but there is an exception to this rule, recognized at the common law and by the jurisprudence of this state. This exception applies to the class of cases styled proceedings *in rem*, or suits in the nature of proceedings *in rem*. In these proceedings or suits the judgments of the courts are conclusive against all persons interested in the subject-matter of the suit, whether they have had actual notice of the proceedings or not. And their validity and conclusiveness rests upon a principle of public policy." See Miller v. United States, 11 Wall. 268.

[3] Seizure is the initial step in proceeding against a thing. What arrest is, in a criminal prosecution against a person, seizure is, in a prosecution against a thing. What citation is, in a personal action, seizuret

8. Under the divisions named, where a title to, a right in, or the determination of some right pertaining to, real property within the jurisdiction, the proceedings become *lis pendens* on the filing of the petition sometimes, and always on the filing of petition and service of notice.[1]

9. Under the classes above named, where the *status* is attached to the plaintiff as a subject of the government, the court, in protection of the citizen, has the sovereign right to

is, in the *actio in rem*, so far as it is notice to all interested. It is absolutely essential to the existence of the action, to the jurisdiction of the court, to the validity of the condemnation. The Hibernia, 1 Sprague, 78; La Jeune Eugenie, 2 Mason, 409; The Moses Taylor, 4 Wall. 411; Parker v. Overman, 18 How. 140; The Fideliter, 1 Abb. (U. S.) 577; The Steamship Fideliter, 1 Sawyer, 153. Seizure is an executive act. When made pursuant to judicial order, it is still an executive act. Whether made under the laws of a state government, or those of the United States, or those of nations; whether made by sheriffs, marshals, naval officers or private individuals, seizure is the exercise of executive functions. Miller v. United States, 11 Wall. 292; Tyler v. Defrees, 11 Wall. 332; Taylor v. United States, 3 How. 197, 205; The Caledonian, 4 Wheat. 100, 103. But see Coppell v. Hall, 7 Wall. 542; The Reform, 3 id. 617; The Ouachita Cotton, 6 id. 521.

[1] Anybody may seize, but he does so at his peril. The rights of property are too important to be lightly dealt with. Freedom from the annoyance of litigation is too precious a privilege to be disturbed without good cause. It would not do to allow every man to set himself up as a representative of the president, and to make himself a seizing officer, without the wholesome check which liability to damages imposes. The Amiable Nancy, 3 Wheat. 546; Little v. Barreme, 2 Cr. 170; Maley v. Shattuck, 3 Cr. 458; Del Col v. Arnold, 3 Dall. 333; Talbot v. Three Brigs, 1 Dall. 103. The man who wrongs another by seizing property and reporting it as forfeited when it has not been forfeited, and when there was not even "probable cause" for its forfeiture, when the principal motive may have been malicious (it is sufficient to the action for damages that the seizure was groundless), ought to be mulcted in sufficient amount to repair the wrong done. A *lis pendens*, duly prosecuted, and not conclusive, is notice to a purchaser so as to bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed. This is no more than the adoption of a rule in real actions at common law, where, if the defendant aliens after the pendency of the writ, the judgment will overreach such alienation. The rule may sometimes operate with hardship, especially where the notice is constructive, as in many cases, but general convenience requires it. Murray v. Ballou, 1 Johns. Ch. 576–80, cases, Kent, Ch. See generally, 4 Cent. Law J. 27–29, cases; 26 id. 411–17, cases; 14 Am. Dec. 774; 1 Story, Eq. secs. 405–7; 3 Pars. Contr. 282.

remove the unjust *status* or sever the same upon proper cause therefor being shown, and set forth the citizenship of the plaintiff as the basis of jurisdiction.[1]

10. Under the first and second divisions (things guilty and hostile), while the action may be deemed a civil one, it partakes of a criminal nature, and the libel should show the wrongful use to which the thing was applied, and by whom, and state the cause of its guilt, or hostility, and ground of forfeiture, setting forth fully the cause of the seizure and sufficient facts to warrant its condemnation.[2]

The validity of every disposition of real property must depend upon the law of the country in which it is situated. Therefore all legal proceedings subjecting such property to sale under judicial process must be brought in the *rei sitæ*, and, in fact, all proceedings *in rem* are in this sense local; for the thing must be before the court or under its jurisdiction, and the proceedings must conform to the laws of the state where the action is brought, whether the property be real or personal.

§ 61. **Judicial inquiries.**— The words "proceedings *in rem*" apply to personal as well as real property, and the term has been applied to proceedings relating to the *status* of persons as well as property, as has been stated. In all proceedings *in rem* three jurisdictional inquiries must be affirmatively an-

[1] See *ante*, § 59, p. 163, n. 1.

[2] City of Norwich, 118 U. S. 503: "It is true that, in United States v. Mason, 6 Bissell, 350, it was held that, in a proceeding *in rem* for a forfeiture of goods, the owner might be compelled to testify, because the suit is not against him but against the goods. That decision, however, was disapproved by this court in the case of Boyd v. United States, 116 U. S. 616, 637, in which it is said: 'Nor can we assent to the proposition that the proceeding *in rem* is not, in effect, a proceeding against the owner of the property as well as against the goods, for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great judge, goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' Vaughan, C. J., in Sheppard v. Gosnold, Vaughan, 159, 172; approved by Ch. Baron Parker in Mitchell v. Torup, Parker, 227, 236. But the argument is at war with the spirit as well as the text of our decisions on the subject of limited liability. The case of The Benefactor, 102 U. S. 214; S. C. 103 U. S. 239, is precisely in point."

swered in order to uphold the judgment or decree rendered, viz.:

1. Did the court have jurisdiction over the thing proceeded against so as to legally render the judgment?[1]

2. Did the court have the authority to determine the subject-matter of the controversy?[2]

3. Did the court acquire jurisdiction over the owner so as to divest him of his right by decree or judgment?[3]

The universal rule of the common law is that the law of the place where property is situated exclusively governs in respect to the rights of the parties, the mode of transfer and the means by which the transfer is made. The title to real property can only be acquired, passed or lost according to the law of the state where it is situated.[4] The sovereign power of the state holds in fact the title (the allodial title) to all real property within its jurisdiction. It also by the same right may, by its courts, deal with and divest the owner of his title to per-

[1] But it is quite a different matter when we are stating facts, any one of which shows the *jus in re* upon which the forfeiture is declared. Facts may be stated in the alternative, if, any one of them being true, the offense is established; any one being true, the hostility of the *res* is the inevitable result. It has been repeatedly decided that "stating a charge in the alternative is good if each alternative constitutes an offense for which the thing is forfeited." The Emily and The Caroline, 9 Wheat. 381; The Caroline, 7 Cr. 496 (note by Judge Story, p. 500); United States v. The Little Charles, 1 Brock. 347; The Merino, 9 Wheat. 391; The Samuel, 1 Wheat. 14; Jacob v. United States, 1 Brock. 520; Parsons on Shipping & Admiralty, vol. 2, p. 383, edition of 1869. Territorial jurisdiction *in rem* includes maritime as well as all other cases in which the direct remedy against the thing is the correct one. The Panama, 101 U. S. 453.

[2] Grignon's Lessees v. Astor, 2 How. 338; Beauregard v. New Orleans, 18 How. 502; Shriver's Lessee v. Lynn, 2 How. 43, 60; United States v. Arredondo, 6 Pet. 709; Voorhees v. Bank of the United States, 10 Pet. 474; State of Rhode Island v. State of Massachusetts, 12 Pet. 718; Florentine v. Barton, 2 Wall. 216; Comstock v. Crawford, 3 Wall. 404; Callen v. Ellison et al. 13 Ohio St. 452; Sheldon v. Newton, 3 Ohio St. 494; Shroyer v. Richmond, 16 Ohio St. 455; Wilder v. City of Chicago, 26 Ill. 182; Dequindre v. Williams, 31 Ind. 456; Smiley v. Sampson, 1 Neb. 56; Mulford v. Stalzenback, 46 Ill. 307.

[3] Morse v. Goold, 11 N. Y. 281; Jackson v. Babcock, 16 id. 246; Gibson v. Roll, 30 Ill. 172; Johnson v. Johnson, id. 215; Goudy v. Hall, id. 109; Mason v. Messenger, 17 Iowa, 268; Grignon's Lessees v. Astor, 2 How. 338.

[4] Bradstreet v. Neptune Ins. Co. 3 Sumn. 607; Windsor v. McVeigh, 93 U. S. 274; Bigelow v. Forest, 9 Wall. 339; Woodruff v. Taylor, 20 Vt. 65.

sonal property by process of law where the court has the custody of the property under its control.

§ 62. Pertaining to things guilty.— Things are rendered guilty, under the statute, either by the active or passive contravention of the law forfeiting them; the jurisdiction of the court attaches from the improper or illegal use of the thing by the possessor, although the owner may not have knowledge of such illegal use. The offense, it has been said, may be attributed to the property. Judge Story says: "The thing is here primarily considered as the offender, or, rather, the offense is primarily attached to the thing; and this whether the offense be *malum prohibitum* or *malum in se*.[1] Many cases exist where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions are dependent upon each other. . . . Both in England and America the jurisdiction over proceedings *in rem* is usually vested in different courts from those exercising criminal jurisdiction." The acts of the party in possession of the property bind the interest of the owner, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the property by reason of the unlawful or wanton wrongs of the party in possession. Chief Justice Marshall says: "It is true that inanimate matter can commit no offense. But this body is animated and put in action by the crew, who are guided by the master."[2] Mr. Justice Curtis says: "There are many cases in which the vessel is treated as the offending thing, and is forfeited wholly, irrespective of the guilt of the owner or the master."[3]

The above principle applies alike to all offending properties. It is, however, true that some person must have been guilty

[1] The Palmyra, 12 Wheat. 14; The Brig Malek Adhel, 2 How. 234.

[2] Schooner Little Charles, 1 Brock, 354; The Porpoise, 2 Curtis, C. C. 310; Coffey v. United States, 116 U. S. 443; Bananeoat v. Gunpowder, 1 Met. 23; Steamer Webb, 14 Wall. 406; Barrels of Liquor, 47 N. H. 374; Lilienthal's Tobacco, 97 U. S. 267; Dobbins v. United States, 96 U. S. 400; Origet v. United States, 125 U. S. 243.

[3] See The Porpoise, *supra*.

of violating the law by the improper use of the thing, or the forfeiture could not have been incurred; for the improper use of the thing must have been exercised by a responsible human agent with the intention of violating the law.[1]

§ 63. Things guilty and things hostile are proceeded against under different systems of law.— Things guilty are only condemned for the violation of municipal law, or the law of the state; while things hostile can only be condemned for a violation of the law of the nation. This distinction, however, relates rather to the different courts possessing jurisdiction than to the legal distinction that exists as a judicial ground of forfeiture. The sale or keeping of intoxicating liquors with intent to sell may work a forfeiture of the liquors, together with the vessels containing the same, under the laws of some states.[2] There are a large number of federal statutes creating forfeitures of property for the violation of the internal revenue laws, and also for smuggling property which is dutiable into the United States, or attempting to do so; also for the forfeiture of lands upon which distilleries have been erected for use in violation of the revenue laws. There are, also, forfeitures provided for under the navigation laws for unloading imported goods without reporting, for vessels trading without enrollment, for piracy, and breach of neutrality laws, slave-trading, and like offenses.[3]

In cases in which the statutes have provided a forfeiture because of the immoral use of property, such as the keeping for sale of obscene books, the seizure of implements for gambling, the keeping of intoxicating liquors for sale in violation of law, they have also authorized the seizure of the thing and its forfeiture or destruction, or both.[4]

[1] The City of Norwich, 118 U. S. 504; Boyd v. United States, 116 U. S. 616, 637.

[2] State v. Creeden, 78 Iowa, 556. See Collins v. Hills, 77 Iowa, 181; Leisy v. Hardin, 78 Iowa, 286; State v. Bowman, 78 Iowa, 519. But see Bowman v. R. R. Co. 125 U. S. 465; Leisy v. Hardin, 135 U. S. 100. See, also, Mugler v. Kansas, 123 U. S. 623; Bartemeyer v. Iowa, 18 Wall. 129; Beer Company v. Massachusetts, 97 U. S. 25; Foster v. Kansas, 112 U. S. 201; Kidd v. Pearson, 128 U. S. 1; Eilenbecker v. Dist. Ct. Plymouth Co. 134 U. S. 31; Powell v. Pennsylvania, 127 U. S. 678.

[3] See forfeitures collated, Proceed. in Rem, by Waples, sec. 148; also ch. 8; also sec. 143; Const. U. S. art. 1, sec. 8, clause 10.

[4] Chief Justice Shaw, in Fisher v.

When notice has been given to the owner of the thing, and the legal time for publication has expired, or the defendant has been brought before the court in a proper method, the jurisdiction to hear and determine the cause or prayer of the information or petition arises.[1] If any portion of the *res* belongs to a person not notified, or if the notice is not served in the manner required by law so as to bind the owner of the *res*, jurisdiction to render the judgment has not been acquired.[2]

§ 64. Jurisdictional division into classes of actions pertaining to things indebted.— There are two divisions that should be made of proceedings *in rem*, pertaining to "things indebted." The first pertains to a class of actions where the entire *res* comes under the control of the court as a basis of jurisdiction. The second are actions personal in their nature, but in which the law permits property to be seized in the progress of the action as a basis of jurisdiction. The latter class has been defined to be a proceeding *quasi in rem*. The first class pertains to admiralty proceedings, probate proceedings, proceedings in bankruptcy, assignments for the benefit of creditors, guardianship proceedings, the levying of taxes and enforcing their payment, maritime liens, pledges, mortgages at common law, employees of receivers and many actions against them, and all actions where notice to the world is given. In bankruptcy and voluntary assignments for the benefit of cred-

McGirr et al. 1 Gray, 27, said: "We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious; and by due process of law, by proceedings *in rem*, to provide both for the abatement of the nuisance and the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale or destruction of the noxious articles."

[1] Nor can a judgment be impeached collaterally for errors or irregularities, such as a defective return of seizure and publication. Cammell v. Sewell, 3 Hurl. & Nor. 617; Castrique v. Imrie, 8 Com. Bench (N. S.), 1; Knoefel v. Williams, 30 Ind. 7; Shroyer v. Richmond, 16 Ohio State, 455, 456; Spaulding v. Baldwin, 31 Ind. 377.

[2] The Mary, 9 Cr. 126, 144; Hollingsworth v. Barbour, 4 Pet. 475; Keating v. Spink, 3 Ohio State, 114, 115; Thompson v. Steamboat Morton, 2 Ohio State, 30; Story's Conflict of Laws, sec. 549; Boswell's Lessee v. Otis, 9 How. 336; Nations v. Johnson, 24 How. 205, 206. *Vide* Harris v. Hardeman, 14 How. 338.

itors, in probate proceedings, including all the estate of the decedent, whether he died testate or intestate, guardian sales, the entire estate is subjected to the payment of debts, is brought before the court, and comes into the hands of the court for sale by it or for final distribution. These classes of actions are purely *in rem*.

In all these actions a general notice is given, by publication, for creditors, parties interested in the distribution, lien-holders, legatees, devisees and heirs at law to appear before the court and take notice of the proceedings; and the world is thereby notified by some one, usually an officer of the court, that the property is under the control of the court for disposition by it. Such disposition is a judicial one, and if by sale, it is a judicial sale. The disposition being a judicial one, it is final, and binding on all the world. The possession of the property gives the jurisdiction; the master, the executor, administrator, assignee in bankruptcy, assignee under the insolvent laws, guardian, treasurer of company, or collector of taxes, by virtue of office, takes possession as a servant of the court or the law, and jurisdiction is acquired; and the general notice always required to be given is notice to the world, and all the parties are before the court. The order of sale in such cases is always an interlocutory order, and ordinarily of a portion of the property in the hands of the court; such sale is made usually by an agent or officer of the court, and is commonly confirmed by the court; and where the statute requires an additional notice to be given to the parties interested of the application for such interlocutory order, or of the sale, such notice is not generally jurisdictional;[1] but when an order of

[1] Grignon's Lessee v. Astor, 2 How. 338: "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 728. A purchaser under it is not bound to look beyond the decree of the court; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is

sale is made in proceedings *quasi in rem*, and the sale is ordered by the final judgment or decree, being a sale for the enforcement of a debt, it is not a judicial sale, as a rule, and the notice runs to the defendant only; the proceeding is no

as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts, in the technical sense of the term, because an appeal lies from their decision. . . . 'The purchaser is not bound to look further back than the order of the court. He is not to see whether the court were mistaken in the fact of debts and children. The decree of an orphan's court in a case within its jurisdiction is reversible only on appeal, and not collaterally in another suit. A title under a license to the administrator to sell real estate is good against the heirs of the intestate, although the license was granted upon the certificate of the judge of probate, not warranted by the circumstances of the case.' 'The license was granted by a court having jurisdiction of the subject, if it was improvidently exercised, or in a manner not warranted by the evidence from the probate courts; yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from a court of competent jurisdiction.' 2 Pet. 168, and 11 Mass. 227, cited. In that case the jurisdiction of the court was held to attach 'when the acceptor dies intestate, and any of the persons entitled to his estate is a minor' (2 Pet. 165); so in this case it attaches on the decease of any person indebted beyond the personal estate he leaves; and when jurisdiction is once attached to a subject, or exists over a person, this court has adopted as a rule applicable to all courts of record that their decisions are conclusive; 'it has a right to decide every question which occurs in a cause, and whether its decision be correct or otherwise, its judgment, until reversed, is binding upon every other court.' 1 Pet. 340. . . . We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from them. They are rules of property, on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolate in collateral actions, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents, by order of those courts to whom the laws of the states confide full jurisdiction over the subject." This case is approved by the courts which rendered the decisions in the former cases: Parker v. Kane, 22 How. 14; Nations v. Johnson, 24 How. 203; Gray v. Brignardello, 1 Wall. 634; Mason v. Wait, 4 Scammon (Ill.), 134; Harvey v. Tyler, 2 Wall. 328; Florentine v. Barton, 2 Wall. 210; Taylor v. Taintor, 16 Wall. 366; Cooper v. Rey-

more than an ordinary adversary action, and jurisdiction to enter the decree rests on the sufficiency of the notice.[1] In the judicial sale, the parties, being in court, must take notice of the proceedings;[2] in the other, the world is not bound, but the parties to the action only and their privies.

nolds, 10 Wall. 308; Tilton et al. v. Cofield et al. 93 U. S. 165; Mohr v. Manierre, 101 U. S. 421; Davis v. Gaines, 104 U. S. 391; Ellis v. Davis, 109 U. S. 485; Applegate v. Lexington, etc. Mining Co. 117 U. S. 267; Culbertson v. Witbeck Co. 127 U. S. 333; Belcher v. Chambers, 53 Cal. 635. Also approved in thirteen cases by the United States circuit courts; also, Comstock v. Crawford, 3 Wall. 403; Snevley v. Lowe, 18 O. 368; Mohr v. Porter, 51 Wis. 487; Mulford v. Beveridge, 78 Ill. 458; Spring v. Kane, 86 Ill. 580; Montgomery v. Johnson, 31 Ark. 74; Camden v. Plain, 91 Mo. 117; Beauregard v. New Orleans, 18 How. 497; Tongue v. Morton, 6 H. & J. 21; McPherson v. Cunliff, 11 S. & R. 422; Gager v. Henry, 5 Saw. 237; Doe v. McLoskey, 1 Ala. 708; Perkins v. Winter, 7 Ala. 855; Matheson v. Hearin, 29 Ala. 210; Satcher v. Satcher's Adm'r, 41 Ala. 39; Rogers v. Wilson, 13 Ark. 507; Sheldon v. Newton, 3 O. St. 496; George v. Watson, 19 Tex. 354; Robb v. Irwin, 15 Ohio, 689; Benson v. Cilley, 8 Ohio St. 614.

[1] See p. 105.

[2] Florentine v. Barton, 2 Wall. 216: "The petition of the administrator setting forth that the personal property of the deceased is insufficient to pay such debts, and praying the court for an order of sale, brought the case fully within the jurisdiction of the court. It became a case of judicial cognizance, and the proceedings are judicial. The court has power over the subject-matter and the parties. It is true, in such proceedings there are no adversary parties, because the proceeding is in the nature of a proceeding *in rem*, in which the estate is represented by the administrators, and as in a proceeding *in rem* in admiralty, all the world are parties. . . . The court having a right to decide every question which occurs in a cause, whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court. The purchaser under such a sale is not bound to look further back than the order of the court, or to inquire as to its mistakes." Beauregard v. New Orleans, 18 How. 502: "It is the settled doctrine of the court that when the proceedings of a court of justice are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within its jurisdiction, they cannot be impeached for error or irregularity; that if a court has jurisdiction its decision upon all the questions that arise regularly in the cause are binding upon all other courts until they are reversed. 2 Pet. 157; 1 id. 340. And when the object is to sell the real estate of an insolvent or embarrassed succession, the settled doctrine is, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land. They are analogous to proceedings in admiralty, where the only question of jurisdiction is the power of the court over the thing — the subject-matter before them — without regard to the parties who have an interest in it. All the world are parties. In the orphans' court, and all the courts

It has often been said that the court, being vested with jurisdiction and having the custody of the property, must, in disposing of the latter, necessarily pass upon and determine all minor questions which arise, among others the question of notice to the parties of the interlocutory order made pertaining to the disposition of such property; or, in other words, determine its own jurisdiction over the person having a right or interest in it; and an erroneous ruling of such court in respect to its own jurisdiction must stand until reversed, and cannot be the basis of collateral attack or its erroneous judgment in that respect be questioned in a collateral proceeding.[1]

which have power to sell the estates of decedents, their action operates on the estate, not on the heirs of the intestate. A purchaser claims not their title but one paramount. The estate passes by operation of law." Sargeant v. State Bank of Indiana, 12 How. 385: "The real veritable record informs us that legal and sufficient notice was given to the heirs of Samuel Sargeant, but whether by this paper or in what other mode (except that it was legal and sufficient) we are not told, and are not at liberty in this case to indulge in inferences against the verity of the record. It is a principle well settled, too, in judicial proceedings, that whatever may be the powers of a superior court in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the exercise of appellate power. To permit the converse of this principle in practice would unsettle nine-tenths of the rights and titles in any community, and lead to infinite confusion and wrong. In support of a principle so obvious and of such universal acceptation as is that just above stated, a recurrence to cases would seem to be wholly unnecessary."

[1] Borden v. State, 11 Ark. 536; S. C. 54 Am. Dec. 228: "Accordingly, the doctrine is distinctly laid down by some of the most respectable authorities, that the judgment of a superior court is not void, but only voidable by plea on error (8 Bac. Abr., Void and Voidable, C, p. 170, citing Prigg v. Adams, 2 Salk. 674; S. C. Carth. 274); thus an erroneous attainder is not void, but voidable by writ of error. 2 Inst. 184; 2 R. 3 fr. 21, 22. See, also, 1 Ch. Pl. 18, and cases cited in note t; also 7 Bac. Abr. 67. The judgments of a superior court are never considered void, and, until set aside, they are to be considered as regular judgments for every purpose. Walbridge v. Hall, 3 Vt. 114. A judgment of a court of competent jurisdiction, though rendered in a form of proceeding unknown to our practice and apparently without service of process, cannot be treated as a nullity while unreversed. Weyer v. Zane, 3 Ohio, 305. However summary or irregular the judgment of a competent tribunal may be, it cannot be treated as a nullity. Buell v. Cross, 4 id. 329. When judgment on a forthcoming bond states that notice was duly proved, it will be taken for granted

In this view we fully concur. The cases cited in the preceding notes to this section bear on this subject. The courts of *dernier resort* often err and overrule their own decisions; but such decisions, when made, although erroneous, are the law.

In contemplation of law all the parties to a proceeding *in rem* are before the court, though often, in fact, they are without knowledge of the suit. But proceedings in bankruptcy, assignments for the benefit of creditors, and the settlement of the estates of decedents, though these are usually matters which attain general notoriety, personal service is often impossible, and constructive service must be resorted to. The general notice of the proceedings *in rem* is almost invariably given, and no hardship rests or is cast on the party to

in the appellate court unless there be a bill of exceptions showing the contrary; but if the judgment contains no such statement, and the defendant did not appear, the judgment will be reversed as erroneous. Beale v. Wilson, 4 Munf. 380. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has a general jurisdiction of the subject, although it be erroneous. Ex parte Watkins, 3 Pet. 202." Sheldon v. Newton, 3 Ohio St. 494; Paul v. Hussey, 35 Me. 97; Fox v. Hoyt, 12 Conn. 491; Raymond v. Bell, 18 id. 81; Reeves v. Townsend, 22 N. J. L. 396; Wright v. Marsh, 2 G. Greene, 111; Wilson v. Wilson, 18 Ala. 176; Carter v. Waugh, 42 Ala. 452; George v. Watson, 19 Tex. 354; Goudy v. Hall, 36 Ill. 313; Moore v. Neil, 39 id. 262; Myer v. McDougal, 47 id. 278; Davenport Loan Association v. Schmidt, 15 Iowa, 213; Morrow v. Weed, 4 Iowa, 77; Frazier v. Steenrod, 7 Iowa, 339; Wight v. Warner, 1 Douglass (Mich.), 384; Clarke v. Holmes, id. 390; Clark v. Blacker, 1 Ind. 215; Hart v. Jewett, 11 Iowa, 276; McPherson v. Cunliff, 11 S. & R. 422; Simpson v. Hart, 1 Johns. Ch. 91; Elliott v. Piersol, 1 Pet. 328; Thompson v. Tolmie, 2 Pet. 157; Voorhees v. Bank of United States, 10 Pet. 473. See and compare Florentine v. Barton, 2 Wall. 216; Stow v. Kimball, 28 Ill. 93; Adams v. Jeffries, 12 Ohio, 253; Ludlow's Heirs v. Johnston, 3 Ohio, 560; Benson v. Cilley, 8 Ohio St. 614; Robb v. Irwin, 15 Ohio, 698; Saltonstal v. Riley, 28 Ala. 164; Stark v. Brown, 12 Wis. 582; Bloom v. Burdick, 1 Hill, 130; Sherry v. Denn, 8 Blackf. 542; Gwin v. McCarroll, 1 Sm. & M. 351; Lessees of Adams v. Jeffries, 12 Ohio, 253; Messinger v. Kinter, 4 Bin. 97; Schneider v. McFarland, 2 Comst. 459; Bank v. Johnson and others, 7 S. & M. 449; Hudson v. Guestier, 6 Cr. 281–5; Bradley v. Fisher, 13 Wall. 351; Fisher v. Hepburn, 48 N. Y. 41, 53; Colton v. Beardsley, 38 Barb. 29, 51; Brittain v. Kinnaird, 1 Brod. & Bing. 432; Ex parte Watkins, 3 Pet. 202, 209; Supervisors, etc. v. Briggs, 2 Denio, 33, 34; Weaver v. Devendorf, 3 id. 117, 120; Henderson v. Brown, 1 Caine, 91; Reg. v. Bolton, 41 Eng. C. L. 439; Cave v. Mountain, 1 Mann. & Gr. 257; Broom's Legal Maxims, 56–66.

appeal when he deems himself aggrieved. We should never confound the erroneous exercise of rightful jurisdiction with the want of jurisdiction. The latter case only renders the judgment void.[1] The same rule is often applied to the power of assessors. When they have no power to assess, the jurisdiction of the subject-matter fails and their acts are void.[2] But when they commit gross errors in the levying of taxes or assessments, the assessment is not void but erroneous.[3]

If this distinction between the two classes of proceedings *in rem* is kept in mind the apparent conflict of authority on this subject will be largely reconciled, particularly if the statutes are examined for the purpose of ascertaining whether the notice of the interlocutory order of sale is required to appear of record or not; for if the statute does so require it, then such notice becomes jurisdictional.

§ 65. **Judicial sale — Definition.** — A judicial sale is one made by a court having jurisdiction over the proceedings in which it is made, and having the property under its control, made by its clearly authorized agent on the order of the court *pendente lite*, and approved or confirmed by it.[4] A judicial

[1] Dequindre v. Williams, 31 Ind. 456; Dynes v. Hoover, 20 How. 65, 80; Hobart v. Frost, 5 Duer, 673; Butler v. Potter, 17 Johns. 145; Prigg v. Adams, 2 Salk. 674; Henderson v. Brown, 1 Caine, 102; Easton v. Calendar, 11 Wend. 90; Knowles v. The City of Muscatine, 20 Iowa, 248; Smith v. Keen, 26 Me. 411; Godard v. Gray, Law R. 6 Q. B. 139; Milne v. Van Buskirk, 9 Iowa, 558; Walker v. Sleight, 30 Iowa, 310, 325; Martin v. Barron, 37 Mo. 301; Bond v. Pacheco, 30 Cal. 530; Chase v. Christianson, 41 Cal. 253; Ex parte Watkins, 3 Pet. 207–9.

[2] Freeman v. Kenney, 15 Pick. 44; Lyman v. Fiske, 17 id. 231; People v. Supervisors, 11 N. Y. 563; Mygatt v. Washburn, 15 id. 316; Bailey v. Buell, 59 Barb. 158; Han. & St. J. R. R. Co. v. Schacklett, 30 Mo. 550; State v. Schacklett, 37 id. 280.

[3] Glasgow v. Rowse, 43 Mo. 479; St. Louis M. L. Ins. Co. v. Charles, 47 id. 462–7; Weaver v. Devendorf, 3 Denio, 117; Van Rensselaer v. Whitbeck & Sharp, 7 Barb. 133.

[4] In Sewall v. Costigan, 1 Md. Ch. Dec. 208, 209, the court say: "In fact, the sale made by him (the trustee) is the sale of the court, he being the mere instrument or agent by whose hands the court acts." In Forman v. Hunt, 3 Dana, 621, the supreme court of Kentucky draws the distinction between sheriffs' sales at law, and judicial sales, as follows: "Sales under execution are made by an officer of the law, who is required by law, as well for the benefit of plaintiffs and defendants as others who may be injured by his official defalcations, to give bond and good security for the faithful discharge of his duties;" and remarks that "the law is the only guide to the sheriff;" that his sales are perfect and com-

sale may arise and become necessary in admiralty proceedings, bankruptcy proceedings, partition proceedings, foreclosure proceedings, equity and law, in assignments for the benefit of creditors, guardianship proceedings, and in proceedings in the settlement of estates of decedents, as well as in other cases, such as the closing out of corporations, winding up of partnerships, and cases of like character.[1] These cases arise whenever property comes into the hands of the court for disposition, sale and distribution. Such sales differ from sheriffs' sales under execution in this: they are made *pendente lite*, while an execution sale is made after the litigation is ended.[2] The judicial sale is always confirmed by the court. The purchaser obtains not simply the title of those who would inherit the property but a paramount one.[3] In all sales that are

plete, and that the title passes to the purchasers without confirmation (ordinarily) of the court; but that "a commissioner appointed by the chancellor to sell is a mere ministerial servant and agent of the chancellor." That he has no guide but his instructions in the decree; gives no bond; must report to the court; and that a sale — that is, an agreement to sell — made by him is not valid "until it is sanctioned by the chancellor." It is in operation until confirmed by the court. In Busey v. Hardin, 2 B. Mon. 407, it is holden that "the highest bidder at sales under execution does not, like a bidder at a sheriff's sale under execution, acquire any independent right to have the purchase completed; but is nothing more than a preferred bidder, or proposer for the purchase, subject to confirmation by the chancellor."

[1] Midhurst v. Waite, 3 Burr. 1262. In Girard Life Ins. Co. v. Farmers' and Mechanics' Bank, 57 Pa. St. 388, the court, in discriminating between the order of sale and a writ of execution, uses the following language: "The word execution has always been understood as meaning a writ to give possession of a thing recovered by judgment or decree. It is clearly distinguishable from a mere order of sale." Griffith v. Bogert, 18 How. 158, 164; Arnold v. Smith, 5 Mason, C. C. 414, 420; Griffith v. Fowler, 18 Vt. 39.

[2] See note 2, page 181.

[3] Proceedings purely *in rem* are where the court in its plenary power of the law, based on legislative will and the authority of the government, lays hold of and acts directly on the property itself and transfers its ownership to the purchaser by a title paramount to that of the owner, and "without regard to the persons who are interested in it." Such proceedings are not by virtue of any contract of the owner, express or implied, but "are analogous to proceedings in admiralty," and "all the world are parties." "The estate passes to the purchaser by operation of law." "It is the settled doctrine in the decisions of this court that the proceeding before the probate court for the sale of lands of a decedent is *in rem;* that the jurisdiction of the court attaches upon a petition setting forth a statutory ground of sale; and that the

strictly judicial there must be a pre-existing order made by the court for the sale of the specific *res* described therein and in the order of sale; and no other property can be sold and all liens are discharged.[1] There must be an order that the sale be reported to the court for confirmation.[2] In such sales the purchaser must look to his title before confirmation of deed, and if the title is bad he must abide by it.[3] The court only can confirm the sale; authority to do so cannot be delegated to its clerk.[4]

§ 66. Judicial sales — Jurisdiction continued — Title of administrator.— The title of property vests in some one immediately upon the death of its owner, subject to the power of the court, under the law, to adjust the legal and equitable rights of all persons interested. These sales may be purely *in rem*, or partly *in rem* and partly *in personam*.[5] The jurisdiction of sales of real property is local; the *lex loci rei sitæ*

order of sale is not void, although the proceedings may abound in errors, if the petition contain the above-stated jurisdictional allegations." And in Wyman v. Campbell, 6 Porter, 219, 232, a still earlier decision of the same court, it is holden that "the proceeding of the orphans' court is *in rem* against the estate of the intestate, and not *in personam*. The order of the court for the sale of real estate, so far as the question of jurisdiction is concerned, may well be compared to the condemnation of goods by a court of exchequer, where jurisdiction attaches upon a seizure — it merely professes to divest the title of the ancestor without affecting the persons or other property of the heirs."

[1] Grignon's Lessee v. Astor, 2 How. 338; Bofil v. Fisher, 3 Rich. Eq. 1; Sheldon v. Newton, 3 Ohio St. 494; Beauregard v. New Orleans, 18 How. 497, 503; Satcher v. Satcher, 41 Ala. 26; Florentine v. Barton, 2 Wall. 216; Moore v. Shultz, 13 Pa. St. 102; King v. Kent, 29 Ala. 542; Matheson v. Hearin, 29 Ala. 210; Field v. Goldsby, 28 Ala. 218; Wyman v. Campbell, 6 Porter, 219; McPherson v. Cunliff, 11 S. & R. 430; Lightfoot v. Lewis, 1 Ala. 479; Lynch v. Baxter, 4 Tex. 431; S, C. 51 Am. Dec. 735.

[2] Lynch v. Baxter, 51 Am. Dec. 735, cases; Halleck v. Guy, 70 Am. Dec. 643, cases; S. C. 9 Cal. 181.

[3] See last note.

[4] Roderigas v. East River Sav. Inst. 76 N. Y. 316; Powell v. Tuttle, 3 Comstock (N. Y.), 396. But *contra*, Bunce v. Bunce, 59 Iowa, 533.

[5] In Vansyckle v. Richardson, 13 Ill. 173, the court say: "The real estate descends to the heir with this charge resting upon it. He cannot incumber or alien it to the prejudice of the rights of creditors. He acquires a vested, but not an absolute, interest in the land. He takes a defeasible estate, liable to be defeated by a sale made by the administrator in the due course of administration. He has no just claim to the land until the indebtedness of his ancestor is fully discharged. He acquires an absolute title only to what remains after the debts are extinguished."

governs. The petition or complaint asking the sale must be such as would resist attack by demurrer.[1] The jurisdiction of the probate court extends to creditors, heirs and devisees only, and not to adverse claimants otherwise than through the heirs.[2] The plenary powers of that court over real estate may seem unwarranted, but they are no greater than is given the executor or administrator over personal property, equally sacred, the title to which vests in him. That title is more in the nature of a trust to collect and preserve the property. It is necessary that power be given the courts to take charge of estates, so that the judicial arm may reach every interest. The rights of remainder-men unborn have to be concluded, and the jurisdiction rests in the property. Rights are changed from the property to the fund, and "to say that the court cannot under circumstances like these convey the fee away would be to assert a doctrine rendering conditional limitations and contingent remainders an evil to a prosperous people."[3] These sales are similar to sales in partition, being judicial in their nature, and sometimes discharge prior incumbrances by mortgages without statutory aid. The jurisdiction of real property can only be obtained by the tribunal of the county where the land, or some part of it, is situated. The sale of one piece of land under such a decree or notice of sale is not in conformity with an order or decree to sell another, even when the sale is approved by the court.[4] But the record should show the three essential elementary and necessary requisites: 1st. That the property is within the jurisdiction and under the control of the court. 2d. That the court has jurisdiction of the subject-matter. 3d. That the requisite statutory notice has been served, or the parties (which is more often the

[1] Morse v. Goold, 11 N. Y. 281; Jackson v. Babcock, 16 N. Y. 246; Johnson v. Johnson, 30 Ill. 215; Reddick v. Bank, 27 id. 145; Alabama Conference v. Price, Ex'r, 42 Ala. 49; Mason v. Messenger, 17 Iowa, 268; Smiley v. Sampson, 1 Neb. 56; Torrance v. Torrance, 53 Pa. St. 505; Long v. Burnett, 13 Iowa, 28; Stokes v. Middleton, 4 Dutch. (N. J.) 32; Satcher v. Satcher's Adm'r, 41 Ala. 26; Eikenbury & Co. v. Edwards, 67 Iowa, 622; Good v. Norley, 28 Iowa, 188.

[2] Shield v. Ashley, 16 Mo. 471.

[3] Bofil v. Fisher, 3 Rich. Eq. 1; Miller v. Greenham, 11 O. St. 486; Moore v. Shultz, 13 Pa. St. 98; Girard Life Ins. Co. v. Farmers' & Merchants' Bank, 57 Pa. St. 388. But see McConnel v. Smith, 39 Ill. 289.

[4] Frazier v. Steenrod, 7 Iowa, 340; Weed v. Edmonds, 4 Ind. 468; Wheatley v. Tutt, 4 Kan. 195.

case in estates of decedents) have appeared or are already before the court.

Another view is that the court has the estate under its control for settlement, and the laws show how it shall or may be dealt with by creditors. The administrator has possession as an officer of the court, and represents all the heirs, and must see that the rights of the creditors are protected; and while he may act, after the claims are established against the estate, his act in asking the order of sale is remedial in its character. He has already defended the claim, or found defense unavailing. In this he represented the owners under the law. The allowance of the claim forms the foundation for the sale. Still, as the legal title rests in the heirs or devisees, there should be, in some form, notice, monition or appearance before the owner is divested of title; for there must be notice or appearance or representation; but if the parties are already in court, and represented by the administrator or executor, the additional statutory notice becomes in many cases directory. I refer to authorities holding notice necessary and jurisdictional.[1] Below are additional authorities affirming the United States supreme court rule.[2]

There is no subject on which the cases are more conflicting than on the question of whether the sale made by a guardian or administrator of the ward's interest in land or the interest

[1] Stark v. Brown, 12 Wis. 582; Bloom v. Burdick, 1 Hill, 130; Sherry v. Dean, 8 Blatchf. 542; Gwin v. McCarroll, 1 S. & M. 351; Lessees of Adams v. Jeffries, 12 Ohio, 253; Messinger v. Kinter, 4 Bin. 97; Schneider v. McFarland, 2 Comst. 459; Bank v. Johnson and others, 7 S. & M. 449; Pope v. Cutler, 34 Mich. 152; Gillett v. Needham, 37 Mich. 143; Sitzman v. Pacquette, 13 Wis. 291; Corwin v. Merritt, 3 Barb. 341; Sheldon v. Wright, 5 N. Y. 518; Rigney v. Coles, 6 Bosw. 486; Sibley v. Waffle, 16 N. Y. 185; Clark v. Holmes, 1 Doug. (Mich.) 394; Palmer v. Oakley, 2 id. 472; Greenvault v. F. & M. Bank, 2 id. 498; French v. Hoyt, 6 N. H. 370; Dakin v. Hudson, 6 Cow. 222; Doe v. Anderson, 5 Ind. 34; Babbit v. Doe, 4 Ind. 356; Arnold v. Nye, 23 Mich. 292; Ryder v. Flanders, 30 Mich. 341; Good v. Norley, 28 Iowa, 188; Rankin v. Miller, 43 Iowa, 11; Halleck v. Moss, 17 Cal. 339; Washburn v. Carmichael, 32 Iowa, 475; Blodgett v. Hill, 29 Wis. 169; Mickel v. Hicks, 19 Kan. 578.

[2] Florentine v. Barton, 2 Wall. 216; Beauregard v. New Orleans, 18 How. 503; Pennoyer v. Neff (5 Otto), 95 U. S. 715; Green v. Van Buskirk, 5 Wall. 307; Christmas v. Russel, 5 Wall. 306; Story's Conflict of Laws, sec. 592; Melhop & Kingman v. Doane, 31 Iowa, 397; Moore v. Shultz, 13 Pa. St. 102.

of heirs is adversary or not. That is not the question. The question is whether, where the statute directs notice to be served of the application for an interlocutory order upon the minor, and it is not served upon him, the notice is jurisdictional, or the failure to serve simply error. The courts are not consistent. In Bunce v. Bunce, *supra*, the Iowa court says that the minor is represented by the guardian, and still it holds that notice is jurisdictional. There are no parties in one sense to a proceeding *in rem*, as we have shown. The law says their estate is primarily liable for debts. The law of inheritance is statutory; the debt being a lien by operation of law to be paid before distribution. The heir must take notice and appeal from the order if his land is sold without this notice. The rule established by the supreme court of the United States must prevail, for that court, being in a sense superior, will force state courts to obey in the end, or give non-residents the advantage over citizens. What resistance can the heir make when the debt is established? None. The administrator resists the creditor until the lien is established. The heir gets the benefit of the sale; and why should he receive the land when he is in court when the estate is distributed and the land sold?

§ 67. Administrators' and executors' sales for the payment of debts and legacies.— The law fixes the *status* of the property and renders it liable to sale on such terms as it provides for the payment of debts. In the absence of a provision of the law rendering lands liable to sale for the payment of debts of the deceased, such sales cannot be made.[1] The general rule is that the title to the lands must rest in the decedent at the time of his death to be the subject of sale. But the statute sometimes makes an equitable interest liable, even where the deceased in his life-time had fraudulently conveyed away the property.[2] The power of the court to subject lands to payment of the debts is an undeniable one. Generally the

[1] Ticknor v. Harris, 14 N. H. 272; Drinkwater v. Drinkwater, 4 Mass. 358: Bergin v. McFarland, 6 Foster (N. H.), 536; Moore v. The Widow, 11 Humph. 512; Pelletreau v. Smith, 30 Barb. 494; Washington v. McCaughan, 34 Miss. 304; Haynes v. Meeks, 20 Cal. 288; Pettit v. Pettit, 32 Ala. 288; Ikelheimer v. Chapman, 32 Ala. 676.

[2] Eberstein v. Oswalt, 47 Mich. 254; S. C. 10 N. W. Rep. 360; Crane v.

application is made on a report by the administrator of the insufficiency of the personal property to pay debts and showing that it has been exhausted. The rule varies in the several states and the statutes must be consulted.

The probate court obtains jurisdiction over the estate of a decedent by probating his will, or, if he died intestate, by appointing an administrator. After the court or executor or administrator has given the prescribed notice to persons interested, the jurisdiction of the court over the estate is complete for the purposes of paying debts, legacies and liens, and for its distribution among those entitled to receive it. The executor or administrator is the officer and agent of the court in managing the estate. An unborn child may inherit and may have a guardian appointed for it. The heirs and legatees hold the estate subject to a trust that the law casts upon it for the payment of debts, and only take by inheritance the residue after the trust is discharged.

§ 68. **Conclusion — Probate sales.**— In ordinary actions between parties the rule is so well established that all parties must be before the court, in order to give jurisdiction, that courts and text-writers seem, in many instances, to have failed to distinguish between notice required to obtain interlocutory orders and notice of the commencement of an action. The jurisdiction of a court of equity and the probate court in the settlement of estates partakes of two natures, an administrative and a judicial one. The administrator or other officer of the court is a fiscal agent of the court in its settlement. The jurisdiction must rest in the property. The death of the intestate, the bankruptcy of an insolvent, the necessity for care of the property of a ward, insane person or person *non compos mentis*, gives the basis of jurisdiction.

Any person having charge of a will, or believing himself interested, may apply for its probate, and any person interested or believing himself to be entitled may apply for the appointment of an administrator, not as plaintiff, but simply by showing the court there is property it should take charge of. So, as to estates of infants and persons *non compos mentis*,

Guthrie, 47 Iowa, 542; Edgerton v. Schneider, 26 Wis. 385; Gridley v. Watson, 53 Ill. 186; Smith v. McConnell, 17 id. 132; Sebastian v. Johnson, id. 282; Ryan v. Duncan, 88 id. 146.

where jurisdiction flows from the property, the court acquires first, the power to care for it; second, the power to sell that which is perishable. Then there must be general notice to all concerned. This is the jurisdictional notice. After that has been done, any other proceedings arising from the administration, and interlocutory orders, if erroneously obtained, are not necessarily jurisdictional unless made so by statute.[1]

[1] Good v. Norley, 28 Iowa, 207, by Dillon, Ch. J.: "Before examination my impression was that notice to the heir, or person interested in the land, either actual or by publication, or otherwise, as the court might prescribe was absolutely essential, was jurisdictional, without which any order for the sale was a nullity. But when I came to trace out the history of the legislation on this subject in this state, and in others from which this state has borrowed it, and to examine this legislation in the light of the decisions of the courts of those states, I must say that my previous opinion has been greatly shaken. As it is unnecessary to decide it, I leave, without any expression of opinion, the question whether the notice required by section 1344 of the code of 1851 is jurisdictional in any sense, and, if so, whether it may not be sufficient to sustain a sale when collaterally attacked, even within five years, that the court appointed a guardian *ad litem* to appear and defend for the infant heir. See on the last point Nelson v. Moon, 3 McLean, 319; Bustard v. Gates, 4 Dana, 429; Bank v. Cockran, 9 id. 395; Day v. Kerr, 7 Mo. 426; Preston v. Bunn, 25 Ala. 507, and cases cited; Sheldon v. Newton, 3 Ohio St. 494; Benson v. Cilley, 8 id. 604; Coon v. Fry, 6 Mich. 506. The following cases relating to administrators' sales, and that, too, under statutes providing that notice of the application should be given in terms as strong as in our statute, if not stronger, hold that the proceeding is *in rem*; that the provision as to notice is directory; and that, if not given, it does not deprive the court of jurisdiction; and hence, an order for a sale without such notice, or upon notice alone to the guardian, while irregular, and reversible on appeal, is not void, when collaterally attacked. Grignon's Lessee v. Astor, 2 How. (U. S.) 319, 1844, leading case; following and approving McPherson v. Cunliff, 11 S. & R. 422, 1824; Salstonstall v. Riley, 28 Ala. 164, 1856; Wilkinson v. Leland, 2 Pet. 627 (*arguendo*, per Story, J.); Sheldon v. Newton, 3 Ohio St. 494, 1854; reviewing previous state decisions, Benson v. Cilley, 8 id. 604, 1858; Howard v. Moore, 2 Mich. 226; Coon v. Fry, 6 id. 506, 1859; Doe v. Harvey, 5 Blackf. 487; Thompson v. Doe, 8 id. 336; Norton v. Norton, 5 Cush. 524. Others to the same effect might be cited. *Contra*, that notice is jurisdictional, Babbitt v. Doe, 4 Ind. 355, 1853; Doe v. Anderson, 5 id. 33, 1854; Doe v. Bowen, 8 id. 197; Gibbs v. Shaw, 17 Wis. 197; French v. Hoyt, 6 N. H. 370, 1833; and others holding the same view may doubtless be found. In the case now before the court there was no fraud practiced on the infant heir. She was only two years of age, and notice of any kind to her would have been a useless ceremony for any purpose, since she would not have understood it, and since her own mother was a party to the proceedings, was represented by counsel, and

§ 69. The world parties to.— Proceedings in probate or orphans' courts are "analogous to a proceeding in admiralty in which all the world are parties." The effect of the decree must be confined to the thing condemned; for without notice

is not shown to have been in any way adversely concerned to her child. The sale was ordered after appearance and consent by the mother and natural guardian, and after a guardian *ad litem* had been appointed to act for the heir. The plaintiff paid full value, received a deed from the administrator, which was approved by the court, and has been in adverse possession of the property ever since 1852. The property meanwhile has doubtless greatly enhanced in value, and it will defeat the reasonable and just expectations of the plaintiff should he lose it at this distant day. On no principle of justice has the heir, under such circumstances, a right which in strength and persuasiveness will at all compare with the right of the purchaser. Every fair mind will thus regard the relative claims of these two parties to this land. This would be so everywhere. But particularly ought this to be so in a new country, which, like ours, is rapidly developing, and where, as a rule, lands are rapidly augmenting in value. Voorhees v. Bank, 10 Pet. 449; Shawhan v. Loffer, 24 Iowa, 217. . . . In tracing out the history of this statute, I found that it had been taken literally from the Michigan act as published in the Revised Statutes of Michigan of 1838, page 311. A prior statute of Michigan, different in effect, though not in substance, was the one which was before the supreme court of the United States in the well-known case of Grignon's Lessees v. Astor, before cited. On further examination it was found that the Michigan act had been taken literally from the Massachusetts statute, section for section. . . . Now the courts of Massachusetts and of Michigan both hold that proceedings under this statute are not like ordinary suits at law against a minor personally, but are in the nature of proceedings *in rem* and not *in personam*. Holmes v. Beal, 9 Cush. 223; Norton v. Norton, 5 id. 524; Arnold v. Sabin, 1 id. 525; Wilkinson v. Leland, 2 Pet. 627, and remarks of Story, J.; Howard v. Moore, 2 Mich. 226; followed in Coon v. Fry, 6 id. 506. And it has been distinctly asserted by the supreme court of Massachusetts, that it is not necessary to ascertain in advance and name all persons interested, but that public notice of the application under section 8 may be given to all persons interested." However, the judgment of the court below in this case was affirmed by an equal division of the supreme court. Later, the *personnel* of the court having changed, the court declined to adopt the views of Judge Dillon, but established the other rule, holding such notice jurisdictional and that the failure to serve it renders the proceeding void. See Washburn v. Carmichael, 32 Iowa, 478; Boyles v. Boyles, 37 Iowa, 592. Shawhan v. Loffer, 24 Iowa, 226: If it appears that there was a notice, though it be defective, or the service thereof be imperfect, neither in strict compliance with the directions of the statute, and the court determine in favor of the sufficiency of such notice and service which is shown upon the record, even though such determination was erroneous, the judgment of the court will not be held void in a collateral proceeding. See the cases cited, and in addition thereto, Dough-

to the world, or an appearance by some one interested who owned or had a title to the thing, the decree would bind no one; and, while the decree is not necessarily conclusive against all lien-holders, it does dispose of all the interest of the decedent in the estate.[1]

The court is dealing with that interest; there is no warranty of title; the disposition is not of the property as in case of things guilty, but of the title of the decedent as it appears of record. In bankruptcy sales the court deals with the interest of the bankrupt; so, also, in guardian sales; but that fact does not change the character of the action. If general notice has been given and the sale is by order of the court, this is sufficient. The jurisdiction extends to the disposition of the decedent's or ward's estate and right. I do not desire in anything I have said to make any dissent to decisions made, but rather to lay the law before the reader as I find it; and feeling as I do that the views of the national court must in the end be adopted as the law, I have leaned in my views in that direction.

erty v. McManus, 36 Iowa, 657; Woodbury v. McGuire, 42 id. 342; Farmers' Ins. Co. v. Highsmith, 44 id. 333. Bunce v. Bunce, 59 Iowa, 536: The court, in speaking of the purpose of the proceeding, say: "What the plaintiff seeks to vacate is, not a judgment, but a mere probate order for a guardian's sale. The proceeding in which the order was made is, in no proper sense, an adversary proceeding, but a proceeding demanded by the interest of the ward. The application made is solely in the ward's behalf. It is in some sense his own application. It is made by his guardian, selected and appointed by the court to act for him, and bound by his oath and his bond to act properly for him, and under the directions of the court. If he is guilty of bad faith or negligence, and thereby involves his ward in loss, he and his bondsman are liable therefor. These considerations show how different an order for a guardian's sale is from a judgment or order obtained against a ward in an action."

[1] Day v. Macon, 18 Wall. 160.

CHAPTER IX.

JURISDICTION QUASI IN REM.

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§ 70. Proceedings quasi in rem.— There are quite a large number of actions, personal in their nature and character, in which jurisdiction is obtained over property attached or under the control of the court, by, through, or on account of the seizure or situation of such property; or if the action is local, the court acquires jurisdiction over the property in the personal action. This we denominate a proceeding *quasi in rem.* Among these are actions by attachment against non-resident, absconding and concealed debtors, proceedings in garnishment, actions of divorce, actions to quiet title, for the foreclosure of mortgages, to establish liens against property, and almost every conceivable personal action where a judgment at law could only be had, and when the nature of the action is such that were the defendant present in court, by appearance or service of process on him, a judgment or decree would be rendered against him at once, if the issues were found for the plaintiff, and the action of the court ended by judgment binding the property within the jurisdiction.

We only propose in this chapter to discuss such questions of jurisdiction as arise in proceedings *quasi in rem.* The disguishing features of this chapter and the last are, that the judgments the court may enter in the proceedings here treated of do not bind the world. The sales of the property sequestrated are not judicial sales, but sales on execution; for the latter differ from the former in this: the judicial sale, strictly speaking, is a sale under an order of court made *pendente lite*, as we have shown, by the court through its officers, and affirmed and approved by it during the progress of the cause, when the decree binds the world under the general notice. A sale by a sheriff or marshal is made in proceedings *quasi in rem* under special execution against certain property attached or in the custody of the court for the purpose of making it liable for a debt.

§ 71. Attachment.— All proceedings by attachment (I mean general attachments, for in some states there are provisions for special attachments, where a party plaintiff seeks to recover a lien on or right to, or some interest in, the personal property or part thereof), when at common law the court would take jurisdiction and the action would be commenced as a civil personal action, if the defendant was personally

served, may become a proceeding *quasi in rem* for the purpose of obtaining jurisdiction, and the judgment of the court in such proceeding is in form a personal judgment; when the defendant does not appear and is served by "constructive service," then the effect of the judgment does not extend beyond the proceeds of the property attached,[1] and the court cannot proceed unless the property of the defendant is found, and has no jurisdiction although publication has been duly made; but if the defendant whose property is attached appears, he is liable to a personal judgment irrespective of the value of the property so seized.[2] Attachment proceedings in such cases are for the purpose of securing the debt and at the same time obtaining general jurisdiction by the seizure of property not primarily responsible.[3] The debtor, being beyond the reach of process, the *jus ad rem* arises by operation of law, not by contract. The creditor, by the seizure, becomes a lien-holder when the attachment is laid on such property as is liable to seizure, and the lien is created or hypothetically dependent upon confirmation by judgment if not set aside *pendente lite* for cause. If set aside without the appearance of the defendant, the jurisdiction is gone. If there are several attachments they are marshaled in their order of priority, and the lien is of a low rank, holding only the interest of the defendant from the date of seizure.[4] It has been held that an attachment outranks an unrecorded mortgage, if the chattel attached was in the state when the mortgage was created by its owner in another state, where recording is required in the state where the attachment is made and the creditor has no notice thereof.[5] This rule is denied in many states and depends upon statute; the better rule is that only the right and interest of the defendant in the property is held under the writ.[6]

[1] Cooper v. Reynolds, 10 Wall. 308.

[2] Robinson v. Nat. Bank of Newberne, 81 N. Y. 393; People v. Baker, 76 N. Y. 87; Casey v. Adams, 102 U. S. 66; Kilburn v. Woodworth, 5 Johns. 37.

[3] Gates v. Bennett, 33 Ark. 475.

[4] Baillo v. Poisset, 8 Martin (N. S.), (La.), 337; Frazier v. Wilcox, 4 Rob. (La.) 517; Parker v. Farr, 2 Browne, 331; Peck v. Webber, 7 How. (Miss.) 658; Reeves v. Johnson, 7 Halsted (N. J.), 29; Meeker v. Wilson, 1 Gall. 419; Nathan v. Giles, 5 Taunt. 558.

[5] Green v. Buskirk, 5 Wall. 307 and 7 Wall. 139; Hardaway v. Semmes, 38 Ala. 657.

[6] *Contra.* But also see Manny v. Adams, 32 Iowa, 165; Bacon v. Thompson, 60 Iowa, 284; Harshber-

§ 72. Attachments — Judgments in.— The judgment in attachment proceedings relates back to the day of the seizure of the property in fact and not the day of the issue of the writ; until that time plaintiff's right is inchoate.[1] The plaintiff acquires a contingent lien by the attachment, defeasible only by its dissolution, and susceptible of becoming a fixed and perfect lien.[2] The right in the property attached is the same whether the *res* be tangible or intangible; and the lien on money garnished is of the same character as of property seized.[3]

The petition in attachment must state the indebtedness of the defendant as in a suit *in personam;* the grounds of attachment are purely statutory, but they usually are that the defendant has absconded or is a non-resident of the state, or is about to dispose or has disposed of his property to defraud his creditors, etc. These grounds are pleaded and supported by the affidavit. If the alleged cause for the attachment is fatally defective the writ is void.[4] The statute need not be strictly complied with; if any ground is well pleaded it is sufficient, in some states,[5] but not in others,[6] although the two grounds are connected by a disjunctive averment. If the alternative allegations render the ground for issuing the writ doubtful

ger v. Harshberger, 26 Iowa, 503; Rogers v. Highland, 69 Iowa, 504; Drake on Attachment, sec. 233.

[1] Tyrell v. Rountree, 7 Pet. 464; Tomlinson v. Stiles, 28 N. J. L. 204; Welsh v. Blackwell, 2 Green (N. J.), 344; Hunt v. Field, 1 Stockt. (N. J.) 42; Williamson v. Bowie, 6 Munford, 176.

[2] Ward v. McKenzie, 33 Tex. 297; Peck v. Webber, 7 How. (Miss.) 658; Lackey v. Seibert, 23 Mo. 85; Hannahs v. Felt, 15 Iowa, 141; Gobre v. McDaniel, 1 McCord, 480. The lien once acquired cannot be conveyed by the legislature. Hannahs v. Felt, *supra;* Brown v. Williams, 31 Me. 408; Bagley v. Ward, 37 Cal. 121.

[3] Parker v. Farr, 2 Browne, 331; Wheeler v. Nicholls, 32 Me. 233; Hannahs v. Felt, 15 Iowa, 141.

[4] Mathews v. Densmore, 43 Mich. 461; Buckley v. Lowry, 2 Mich. 418; Wilson v. Arnold, 5 id. 98; Cross v. McMaken, 17 id. 515; Sharpless v. Ziegler, 92 Pa. St. 467.

[5] Commercial Bank v. Ullman, 10 S. & M. 411; Cannon v. Logan, 5 Porter, 77; Wood v. Wells, 2 Bush, 197; Hardy v. Trabue, 4 id. 644; Conrad v. M'Gee, 9 Yerg. 428; Goss v. Gowing, 5 Rich. 477; Hopkins v. Nichols, 22 Tex. 206; Bosbyshell v. Emanuel, 12 S. & M. 63; Van Alstyne v. Erwine, 1 Kernan, 331; Klenk v. Schwalm, 19 Wis. 111; The Confiscation Cases, 20 Wall. 106.

[6] See Devall v. Taylor, Cheves, 5; Jewel v. Howe, 3 Watts, 144; Wray v. Gilmore, 1 Miles, 75; Culbertson v. Cabeen, 29 Tex. 247; Guile v. McNanny, 14 Minn. 520; Stacy v. Stichton, 9 Iowa, 399; Hawley v. Delmas, 4 Cal. 195.

they are fatal.[1] The petition or complaint against defendant, setting forth the grounds of the attachment, should appear of record; for if no legal grounds are shown for the issuance of the writ the jurisdiction fails and the judgment is void.[2] The seizure may be made even after the return day[3] and after publication and judgment;[4] but the rule is doubted as to seizure after judgment, as the judgment would be a nullity against a non-resident if no property had been attached.

§ 73. **Description of property.**— The description of the property attached should be so definite that it can be identified, or at least sufficient to notify third parties on inquiring, and clearly so in attachments against real property, where the officer holds no actual possession, lest subsequent purchasers from the defendant should suffer. The return should show where the property was attached.[5] There must be notice to defendant as prescribed by statute in this proceeding, even if the attachment is by garnishment.[6] But actual personal service out of the state when provided for by statute is good, for service is the basis of jurisdiction. Although proof of the service of notice is defective, the finding of a sufficient service by a court of general jurisdiction is held good against a collateral attack.[7] The cases cited in note below were cases of defective service; not where there was none. The rule laid down by the supreme court of the United States in Cooper v. Reynolds,[8] so often cited, is correct; the statutory notice must be given in these actions. The parties are not in court by a general monition to the world, and due service must

[1] Munroe v. Cocke, 2 Cranch, C. C. 465.

[2] Belmont v. Cornen, 82 N. Y. 256; Howe Machine Co. v. Pettibone, 74 N. Y. 68; Endel v. Leibrock, 33 Ohio St. 254; Whitney v. Brunette, 15 Wis. 61.

[3] Courtney v. Carr, 6 Iowa, 238.

[4] Schall v. Bly, 43 Mich. 402.

[5] Pine Saw Logs v. Sias, 43 Mich. 356.

[6] Cochran v. Loring, 17 Ohio, 409; Nat. Bank v. Lake Shore R. R. Co. 21 Ohio St. 221; Ridley v. Ridley, 24 Miss. 648; Miller v. Davison, 31 Iowa, 435; Bates v. Railroad, 19 Iowa, 260; Grant v. King, 31 Mo. 312; Crouch v. Crouch, 30 Wis. 667; King v. Harrington, 14 Mich. 532; Clark v. Bryan, 16 Md. 171; Warner v. Webster, 13 Ohio, 505; Calhoun v. Ware, 34 Miss. 146.

[7] Gregg v. Thompson, 17 Iowa, 107; Beech v. Abbott, 6 Vt. 586; Williams v. Stewart, 3 Wis. 778; Bromley v. Smith, 2 Hill, 517; Paine v. Mooreland, 15 Ohio, 435.

[8] 10 Wall. 308.

be made to give jurisdiction.[1] The law of retroaction renders the lien by attachment perfect from the time of seizure, if confirmed by judgment.[2]

§ 74. Mortgage liens, vendors' liens and mechanics' liens on real property in rem.— In discussing the jurisdiction of these liens I confine myself to proceedings *quasi in rem*, and need only refer to the nature of these actions as against non-residents, to state the fact that the jurisdiction is local. The suit must be brought in the jurisdiction where the real estate is situated; the mechanic's lien is purely the creature of legislation, and is governed by the *lex rei sitæ*,[3] and is enforceable alone in the proper courts of the state where the property is situated. But the federal courts have jurisdiction, however, where the citizenship of the parties permits, as well as between aliens and citizens and citizens of different states, where the property is within the jurisdiction.[4]

The mortgage lien is also local, although well known at common law as a subject of equity jurisdiction. Vendors' liens exist in equity, and give the vendor a lien on the land sold for the unpaid purchase money, not only against the vendor himself and his heirs and other privies in estate, but against subsequent purchasers with notice that the purchase money is unpaid.[5] All actions for the enforcement of this lien partake of the nature of personal actions, and are dual in their character, in praying a judgment for the debt, and, in most of the states, the enforcement of the lien against the *res*.

The law, from necessity, imposes on all persons owning property in a foreign jurisdiction the duty of informing themselves of the *legis rei sitæ*, and such public acts as are created are constituted notice of proceedings and actions in courts

[1] Schall v. Bly, 43 Mich. 402; Watson v. Hinchman, 42 id. 27; State Bank of Fenton v. Whittle, 41 id. 365; Horn v. Wayne Ct. Judge, 39 id. 15; Brown v. Blanchard, id. 790; Linn v. Roberts, 15 id. 443; Hyde v. Nilson, 11 id. 353. But see Loder v. Littlefield, 39 Mich. 512.

[2] Laird v. Dickerson, 40 Iowa, 665.

[3] Canal Co. v. Gordon, 6 Wall. 571: "Liens of this kind were unknown in the common-law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law. Where they exist in this country they are the creatures of local legislation. They are governed in everything by the statutes under which they arise."

[4] Wharton on Conflict of Laws, sec. 321.

[5] Brown v. Pierce, 7 Wall. 205.

of justice.[1] Where junior lien-holders are made parties, they too must take notice of the foreclosure by prior lien-holders, and redeem if served by publication.[2]

§ 74a. Liens, statutory.— We desire to say something more as to the jurisdiction of mechanics' and other statutory liens. Not infrequently the jurisdiction is specially conferred on courts not having equity jurisdiction. It is very important that the court should have jurisdiction over liens generally, or chancery power to avoid conflict with other courts, and the process thereof. Where the jurisdiction is conferred on a court by name, it may proceed, although the amount of the lien exceeds the sum which is the limit of the general jurisdiction of the court.[3] The lien is the creature of the statute and must be obtained in conformity with the procedure prescribed by the legislature. It stands like rights of action which are created by statute and in which a special remedy is given.[4] The action to enforce a lien is not an action as at common law, but more in the nature of a chancery proceeding; the lien has been regarded as a mortgage, and enforceable in such a proceeding.[5] Where the lien must be filed within a time fixed by statute after the work is done or materials furnished, the court has no jurisdiction if filed after that period, and the question may be raised by demurrer where the time of filing appears on the face of the petition.[6] These proceedings are held by all the courts as proceedings *quasi in rem*, and an order or decree enforcing the lien is always confined to the parties to the action.[7] The proceeding, when enforceable as

[1] Story's Eq. 467; McLearn v. McLellan, 10 Peters, 640.

[2] McKim v. Mason, 3 Md. Ch. 186; Howard v. Robinson, 5 Cush. 119; Foster v. Henderson, 54 Iowa, 220; Billings v. Kothe, 49 Iowa, 34.

[3] Platt v. Smith, 28 Mo. 593.

[4] Richardson v. Warwick, 7 How. (Miss.) 131; Brown v. Brown, 2 Sneed (Tenn.), 431.

[5] Brock v. Bruce, 5 Cal. 279; Quimby v. Sloan, 2 E. D. Smith, 594.

[6] Stebed v. Stock, 31 Mo. 456.

[7] McGraw v. Bayard, 96 Ill. 146; Hickox v. Greenwood, 94 Ill. 266; Cairo & Vin. R. R. Co. v. Fackney, 78 Ill. 116; Hamilton v. Dunn, 22 Ill. 259; Clarke v. Boyle, 51 Ill. 104; Hamilton v. Naylor, 72 Ind. 171; Woolen v. Wishmier, 70 Ind. 108; Marvin v. Taylor, 27 Ind. 73; Redfield v. Hart, 12 Iowa, 355; State of Iowa v. Lake, 17 Iowa, 215; Jones v. Swan, 21 Iowa, 184; Noel v. Temple, 12 Iowa, 276; McInerny v. Reed, 23 Iowa, 410; Stockwell v. Carpenter, 27 Iowa, 119; Clifton v. Foster, 103 Mass. 233; Rose v. P. & B. Works, 29 Conn. 256; Goodman v. White, 26 id. 317; Coleman v. Freeman, 3 Ga.

a law action, does not require that lien-holders by mortgage or judgment should be made parties, but only persons who hold liens of the same kind.[1] The statutes of redemption, when applicable to judgments in ordinary personal actions, have generally been held not to include sales under mechanics' liens.[2]

§ 75. Jurisdiction in divorce cases against non-residents — Alimony and custody of children.— The action for divorce is a personal action. It is generally dual in character and may be regarded as a mixed action. Marriage is a legal *status*, voluntarily assumed, existing between one man and one woman only, competent to marry, and under obligation to each other to discharge the conjugal relation until death separates them or the *status* is dissolved by a competent court for cause on the application of the innocent party.

There are three kinds of proceedings for divorce.

1. A marriage is rendered voidable for impotence, on application of the perfect party.[3]

2. A divorce *a vinculo matrimonii.*

3. Divorce *a mensa et thoro.*

An action in some of the states will lie in a court of equity for alimony alone, without divorce, where the wife is separated from the husband because of his misconduct sufficient to justify a separation.[4] We think that equity has jurisdiction in such

137; Hilliard v. Allen, 4 Cush. 532; Canal Co. v. Gordon, 6 Wall. 561; Jackson v. Davenport, 20 Johns. 537; Kendall v. McFarland, 4 Oregon, 292: Wharton v. Douglas, 92 Pa. St. 66.

[1] State v. Eads, 15 Iowa, 117; Vito Viti v. Dixon, 12 Mo. 483; Howard v. Robinson, 5 Cush. 119; Phillips on Mechanics' Liens, sec. 464.

[2] Bailey v. Hull, 11 Wis. 289.

[3] Bishop on Marriage and Divorce, §§ 96, 339*a*; Smith v. Morehead, 6 Jones, Eq. 360.

[4] Graves v. Graves, 36 Iowa, 310; Galland v. Galland, 38 Cal. 265; Butler v. Butler, 4 Littell, 201; Williams v. Callow, 2 Vern. 752; Watkins v. Watkins, 2 Atkyns, 98; Purcell v. Purcell, 4 Hen. & Mun. 507; Almond v. Almond, 4 Randolph, 662; Prather v. Prather, 4 Desaus. 33; Rhame v. Rhame, 1 McCord, Ch. 197; Glover v. Glover, 16 Ala. 446; Willingsford v. Willingsford, 6 Har. & J. 485; Helms v. Franciscus, 2 Bland, Ch. 568; Farber v. Farber, 64 Iowa, 362; Whitcomb v. Whitcomb, 46 Iowa, 437; Platner v. Platner, 66 Iowa, 378; Finn v. Finn, 62 Iowa, 482; Lockridge v. Lockridge, 3 Dana, 28; Coryv. Cory, 3 Stock. 400; Ruckman v. Ruckman, 58 How. Pr. 278; Anshutz v. Anshutz, 1 C. E. Green, 162; Harris v. Harris, 7 Iredell, Eq. 111; Russell v. Russell, 42 N. W. R. (Mich.) 983; Lindenschmidt v. Lindenschmidt, 29 Mo. App. 295;

cases, and, while there is a conflict of authority, the rule is being recognized in many states.

The proceedings for divorce *a mensa et thoro* are becoming less usual than proceedings for divorce *a vinculo matrimonii*. The former rests on no legal, moral or equitable foundation. Kent says: "These qualified divorces are regarded as rather hazardous to the morals of the parties, throwing the parties back upon society in the undefined and dangerous character of a wife without a husband and a husband without a wife." [1] Bishop, in his work on Marriage and Divorce, uses still harsher words.[2]

It has been laid down in a well-considered case that the jurisdiction of the subject-matter in the divorce law of the several states of the United States is not a mere statutory jurisdiction bestowed on the tribunal exercising it, but it finds precedents in, and is settled by, the rules of the ecclesiastical courts so far as applicable.[3]

§ 76. Status of parties.— In one sense a *status* or condition can hardly be called a thing. It may mean an estate in the sense of the condition or relation in which a person may stand toward it.[4] It is a condition of a person, such as being an infant, a slave, or a married man or woman, a ward or a prisoner.[5] In the relation in which it arises, it is purely transitory, yet follows as a condition attached to the person; as, when a man and woman are married, each carries that *status*, so that a court having jurisdiction over one, may dissolve it as to both.

Peyre v. Peyre, 79 Cal. 336; Maas v. Maas, 34 N. J. Eq. 113. See Newton v. Newton, 32 Mo. App. 162. American cases on the subject of alimony are collected in 1 Lawyers' Rep. Ann. 320. Blackinton v. Blackinton, 141 Mass. 432; Hagle v. Hagle, 68 Cal. 588; Story's Eq. sec. 1423*a*; Barber v. Barber, 21 How. (U. S.) 582.

[1] Blackinton v. Blackinton, 141 Mass. 432; 2 Kent, Com. 127.

[2] Doughty v. Doughty, 28 N. J. E. 581. It could never have been tolerated had not the idea entered man's mind as a part of his religion that marriage could not be dissolved without committing an offense against God, from which point the slope was easy toward any compromise with good sense; and as the fruit of compromise we have the ill-begotten monster of divorce *a mensa et thoro*, made up of pious doctrine and worldly stupidity. Bishop on Marriage and Divorce, sec. 29; Barrere v. Barrere, 4 Johns. Ch. 187.

[3] Le Barron v. Le Barron, 35 Vt. 365.

[4] Taylor's Law Glossary, 502; Anderson's Law Dictionary, 968.

[5] See note 4, p. 201.

It arises more commonly in suits for divorce, and it may now be said that where one of the parties becomes a resident of a state, or is domiciled therein, he or she may apply to the court of the state having jurisdiction over that party as a citizen thereof, and the court may dissolve that relation or *status*, although the other spouse has never been within the jurisdiction of the state, and owes no allegiance to it.[1] It therefore is necessarily held to be a thing, within the meaning of the law, that is attached to citizenship, or a domiciled person in the state, and the jurisdiction grows out of that thing.[2]

[1] Cheever v. Wilson, 9 Wall. 122; Cheely v. Clayton, 110 U. S. 705. The court say: "The courts of the state of the domicile of the parties doubtless have jurisdiction to decree a divorce, in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere. Story, Conflict of Laws, sec. 230*a*; Cheever v. Wilson, 9 Wall. 108; Harvey v. Farnie, 8 App. Cas. 43. If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicile after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that state. Burlen v. Shannon, 115 Mass. 438; Hunt v. Hunt, 72 N. Y. 217. But in order to make the divorce valid, either in the state in which it is granted or in another state, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first state requires."

[2] In the Succession of Winn, 25 La. Ann. 216; Michel v. Wiel, id. 208. "The decision of the state tribunals as to the true construction of the laws of their sovereignty are binding upon the federal courts." Walker v. Harbor Com. 17 Wall. 648; Galpin v. Page, 18 Wall. 350; Bailey v. Magwire, 22 Wall. 215; Secombe v. R. R. Co. 23 Wall. 108. "A statute of a state is valid that provides for substituted service upon a defendant not a citizen of the state and absent from its jurisdiction." Gibbs v. Queen Ins. Co. 63 N. Y. 114. "If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, then, we think, that the laws would have bound them." Schibsby v. Westenholz, Law Rep. 6 Q. B. 155; Black v. Black, 4 Bradf. 174. And where a case is that of a citizen of another state, domiciled in the state of suit, and judgment is against him wherein substituted service is provided, he is bound by it, although actually abiding in this state, and when it has been duly made, he is subject in person to the state court awarding it. Hood v. Hood, 11 Allen, 196. Cooley on Const. Lim. 404, says: "The right of the legislature to prescribe such notice and to give it effect as process rests upon the necessity of the case, and has long been recognized and acted upon." Nations v. Johnson, 24 How. (U. S.) 195; In re Empire City Bank, 18 N. Y. 199; Borden v. Fitch, 15 Johns. 121; Burd v.

Therefore, when a state receives persons within it, it has a right to determine whether it will accept the *status* of such persons or not. Taney, C. J., of the supreme court of the United States, says: "Every state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory."[1] In the language of Judge Story: "The doctrine now firmly established in America upon the subject of divorces is that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by local law; without any reference to the law of the place of the original marriage, or to the place where the offense for which the divorce is allowed is committed."

In this country, the statutes usually require that the party plaintiff in divorce proceedings shall be domiciled for a sufficient period of time within the state to give jurisdiction to the courts, sufficient usually to gain a residence or citizenship. Many of the states, if not all, require that the plaintiff shall aver in the bill that he or she is a *bona fide* resident of the state, and has not come within its jurisdiction for the purpose of obtaining divorce. Marriage is favored in law, and the dissolving of the relation or *status* is not favored. The state, having control over the *status* of its own citizens, regards such *status* as a thing, and the proceeding to dissolve it *in rem*, and therefore subject to the local law.[2]

§ 77. **Domicile.**— The doctrine that the court where either of the married parties resides has jurisdiction to grant a divorce has, not without a struggle, won its way to the front in the United States; but it has not been, as yet, acknowledged in England or Scotland; but the tendency is, particularly in England, to follow the American rule.[3] There is,

Briggs, 9 Mass. 464; Berber v. Root, 10 id. 262; Ditson v. Ditson, 4 R. I. 107; Harding v. Alden, 9 Greenl. 140. When the wife is apart from her husband because his conduct entitles her to an absolute or limited divorce, she may acquire a separate domicile. The right springs from the law of necessity.

[1] Strader v. Graham, 10 How. 82.

[2] Cheever v. Wilson, 9 Wall. 108; Barber v. Barber, 21 How. (U. S.) 582; Gelpcke v. City of Dubuque, 1 Wall. 206; Thompson v. State, 28 Ala. 17; Richmond v. Smith, 15 Wall. 438; Kline v. Kline, 57 Iowa, 386.

[3] Story's Conflict of Laws, 230*a*; Harding v. Alden, 9 Greenl. 140; Tolen v. Tolen, 2 Blackf. 407; Wall v. Williamson, 11 Ala. 826; Fellows v. Fellows, 8 N. H. 160; Thompson v.

however, no jurisdiction without domicile of at least one of the parties in the state or jurisdiction where the action is brought. That domicile must be actual and *bona fide*.[1]

The state has no power to change the matrimonial condition of strangers temporarily within its territory; and every nation may determine the *status* of its own domiciled subjects, and any interference by foreign tribunals would be an officious intermeddling with a matter of which they have no concern. The parties cannot assent to the change of *status*, and the judgment is not binding in a third country, for the law of the state where they, or one of them, resides, will take care of the *status* of its own subjects. The rule is, that to enable the court to take jurisdiction it is sufficient for one of the parties to be domiciled in the country; both need not be; neither need the citation, where the domiciled party is plaintiff, be served personally on the defendant, if he or she is a non-resident.[2] For the purposes of a divorce, both the husband and wife may have a separate and independent residence.[3] Were this not the law, where one of the parties actually had a *bona fide* residence in one state and the other had a residence in another state, neither state could settle and determine the *status* of its own subject, while each must yield to a foreign power in the management of its domestic concerns.[4] The state would be compelled to refuse redress to its own citizen

The State, 28 Ala. 12; Turner v. Turner, 44 Ala. 437; Hood v. Hood, 11 Allen, 196; Beard v. Beard, 21 Ind. 321; Shreck v. Shreck, 32 Tex. 578; Kline v. Kline, 57 Iowa, 386; Shafer v. Bushnell, 24 Wis. 372; D'Arcy v. Ketchum, 11 How. (U. S.) 165; Ditson v. Ditson, 4 R. I. 87. Holding it would not undertake to dissolve a marriage between parties so situated, the sentence of dissolution ought not to be held binding, on general principles of law, in every other state. Hunt v. Hunt, 72 N. Y. 217; Burlen v. Shannon, 115 Mass. 438; Cheely v. Clayton, 110 U. S. 705.

[1] Bishop on Marriage and Divorce, sec. 144; Conway v. Beazley, 3 Hag. Ec. 639; House v. House, 25 Ga. 473; Dolphin v. Robins, 7 H. L. Cas. 390; Leith v. Leith, 39 N. H. 20; Hoffman v. Hoffman, 46 N. Y. 30; Kerr v. Kerr, 41 N. Y. 272; Whitcomb v. Whitcomb, 46 Iowa, 437; Rush v. Rush, 48 Iowa, 701.

[2] Wright v. Wright, 24 Mich. 180; Bishop on Marriage and Divorce, 156, 157, and cases previously cited.

[3] Cheever v. Wilson, 9 Wall. 108; Cheely v. Clayton, 110 U. S. 705.

[4] The supreme court of the United States said, by Taney, C. J.: "Every state has an undoubted right to determine the *status* or domestic and social condition of the persons domiciled within its territory." Strader v. Graham, 10 How. 82.

for a wrong committed, and refuse a citizen not in fault the solace of actual married life.

The reason of the rule rests on the *status* of the resident party, the same as though a party who had become a citizen or resident of a state was a slave and entitled to freedom. The sovereignty would, in protection of its citizen by adoption, remove the thraldom attached to him, although the pretended owner was away and not within the jurisdiction.

§ 78. **Alimony.**— While the courts of the state where only one of the parties is domiciled have jurisdiction over their *status* so as to grant a valid divorce, even where the defendant does not appear, and is not served within the jurisdiction except by publication, or some other mode authorized by statute, the power of the courts does not extend beyond the state in fixing either the custody of children, not in the state, or in granting a judgment for alimony. The judgment would snap the *vinculum* for the domiciled party, but it does not affect property rights out of the jurisdiction when the defendant does not appear and is not served within the jurisdiction.[1]

If the child or children of the marriage were within the jurisdiction the court could by decree settle the right to its or their custody; so it could lay hold of any property in possession of the plaintiff and fix the rights of the parties as to that, and also, perhaps, as to any real property in the state, such as a homestead or other property referred to and described in the petition or bill, quieting the title thereto in the plaintiff in whole or in part under proper allegations. I do not think without attachment or other process of seizure the judgment for alimony against a non-resident defendant not served within the jurisdiction, and not appearing, is of any validity even at home, unless the property was in some way brought under the control of the court. It is in the nature of any other judgment.[2]

§ 79. **Custody of children.**— A court of chancery has full jurisdiction over children during their minority, and when it

[1] Kline v. Kline, 57 Iowa, 386; Cooley on Constitutional Limitations, 403-4; Jackson v. Jackson, 1 Johns. 424; Beard v. Beard, 21 Ind. 321; Sanford v. Sanford, 5 Day, 353; Turner v. Turner, 44 Ala. 437; Webster v. Reid, 11 How. (U. S.) 437; Boswell v. Otis, 9 How. (U. S.) 336; Mills v. Duryee, 7 Cranch, 481; Montgomery v. Samory, 99 U. S. 488; Pennoyer v. Neff, 95 U. S. 745, and cases cited.

[2] See last note; also see *ante*, § 60.

grants a divorce it usually awards them to that party to the proceedings who will best promote their welfare. The child is not a party to the suit, but on dissolution of the marriage, if it is within the jurisdiction of the court, it becomes its ward. The court gives its custody either permanently or temporarily to one of the parties. It may refuse it to either. If, however, the child is not in the state, but with the other parent out of the jurisdiction, then if the defendant has not been personally served with process and has not appeared, the court for two reasons, cogent, as they seem, has no control over it: 1. It is not a citizen of, or domiciled in, the state, and not under its jurisdiction, but is under the jurisdiction of another state, which fixes and controls the *status* of its own citizens. 2. The custody is not in fact in the plaintiff and therefore is not drawn to this party, and the state of its domicile has sole control over it. The jurisdiction rests only on the *status* or *rem*, and the *status* does not draw any incidents such as property rights, custody of children, or other thing not within the territory.[1]

§ 80. Custody of children continued, with suggestions on alimony and other connected subjects.— The jurisdiction *in rem* would cover the *status* of a slave in a free state, and the court should dissolve that *status* while the owner of the slave was in the state, surely while the master and slave were there.[2] When one of the parties to a marriage demanded alimony without a divorce, and was domiciled in the state as a resident, such action might be maintained if the property of the defendant was brought under the control of the court. And where one of the parties, a resident of a foreign state, has obtained a valid and binding divorce in that jurisdiction, the court of the state where the children were could fix their *status*, custody and control; for that is a material incident to the proceedings; the foreign tribunal had no control over them, and the domestic tribunal of defendant might take juris-

[1] See Cooley on Constitutional Limitations, 403, 404, and cases cited under last section. Hall et al. v. Lanning, 91 U. S. 160; Pennoyer v. Neff, 95 U. S. 728, 733; Renaud v. Abbott, 116 U. S. 288; Heidritter v. Elizabeth Oil-cloth Co. 112 U. S. 300: Hart v. Sansom, 110 U. S. 155, 156; Pana v. Bowler, 107 U. S. 545; St. Clair v. Cox, 106 U. S. 353; Ins. Co. v. Bangs, 103 U. S. 441; Kilbourn v. Thompson, 103 U. S. 197, 198; Mohr v. Manierre, 101 U. S. 417.

[2] See note 1, p. 209.

diction of a bill for alimony or decide as to the custody of children, the foreign tribunal only having power to sever the *vinculum*.[1]

Much controversy has arisen over dower and like questions, but we think the better rule is that when the divorce is legally granted anywhere the right of dower is cut off by the divorce, as such right is attached to the marriage and falls with it on dissolution.[2] But where the husband, where the marriage was contracted and solemnized, comes into possession of the wife's money or personal property and flees to another state, deserting her, and she procures a divorce in the courts of her domicile, she should in equity have leave to go to the state where he was domiciled or where he had property and procure her rights as she might have maintained them, and also the custody of minor children or property, the same as any other personal right.[3]

If the defendant has been served in the state where the action is brought the court acquires jurisdiction of the parties and may settle the entire matter by decree. If not so served, one essential element of jurisdiction has failed — the power of the court over the person domiciled abroad, except so far as to dissolve the marriage *status*. The court has no power, over citizens domiciled elsewhere, to grant any relief beyond the divorce, unless the defendant appears or has property in the state that may be reached by the decree or attachment; yet it is held in Massachusetts that the *status* gives jurisdiction for the purpose of granting alimony only.[4] This may be correct

[1] Jackson v. Jackson, 1 Johns. 424; Crane v. Meginnis, 19 Am. Dec. 237; S. C. 1 Gill & J. (Md.) 463; Townsend v. Griffin, 4 Harr. 440; Cooley on Constitutional Limitations, 406; Woods v. Waddle, 44 O. St. 449; Neff v. Beauchamp, 36 N. W. R. (Iowa) 905; Kline v. Kline, 57 Iowa, 386. See note 4 below.

[2] Barber v. Barber, 21 How. (U. S.) 582.

[3] See note 2 above, and see 2 Story's Eq. Jur. 1472.

[4] Jones v. Jones, 2 Am. St. Rep. 450; S. C. 108 N. Y. 415: "In the determination of the question whether the Texas court acquired jurisdiction of the person of the defendant in the action it must be conceded at the outset that the service of the citation upon the defendant here, who at the time was a resident and citizen of New York, owing no allegiance to the state of Texas, was utterly void and ineffectual as a means of giving the courts of Texas jurisdiction of the defendant. The process of courts run only within the jurisdiction which issues them. They cannot be served without the jurisdiction, and

as applied to property in the state, the jurisdiction issuing from citizenship; but it is doubtful whether such judgment would be good beyond the state where the only service was by publication and defendant did not appear.

I can see reasons why the court can lay hold of property in the state by bringing it under the jurisdiction by seizure on attachment, but the judgment for alimony is distinct from the dissolution of the marriage and stands on the same footing as any debt in a jurisdictional point of view.

There are several states that will not take jurisdiction over non-resident defendants served by publication only, and not appearing, and dissolve the marriage; but as the national courts have conceded the jurisdiction, the rule stated must become general. The domicile of the husband is not the domicile of the wife when by his acts he has given her grounds for a divorce, and she may acquire a separate residence.[1]

courts of one state cannot acquire jurisdiction over the citizens of another state, under statutes which authorize a substituted service, or which provide for actual service of notice without the jurisdiction so as to authorize a judgment *in personam* against the party proceeded against. This question has recently been considered in several cases in this state with a fullness of argument and illustration which leaves nothing to be said, and it is sufficient to refer to the decisions. Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; 7 Am. Rep. 299; Hunt v. Hunt, 72 N. Y. 217; 28 Am. Rep. 129; People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274; O'Dea v. O'Dea, 101 N. Y. 23. It cannot be doubted, therefore, that the Texas court did not acquire jurisdiction of the defendant in the action by the service of the citation here, or that if the defendant had remained silent, taking no notice of the proceeding, no valid judgment could have been rendered against him. The contract of marriage cannot be annulled by judicial sanction any more than any other contract *inter partes*, without jurisdiction of the person of the defendant. The marriage relation is not a *res* within the state of the party invoking the jurisdiction of the court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service, or actual notice of the proceeding given without the jurisdiction of the court where the proceedings are pending. Folger, J. Hunt v. Hunt, *supra;* Cheever v. Wilson, 9 Wall. 108." See People v. Baker, 32 Am. Rep. 274; S. C. 76 N. Y. 78.

[1] Harteau v. Harteau, 14 Pick. 181; Jenness v. Jenness, 24 Ind. 355; Ditson v. Ditson, 4 R. I. 87; Hollister v. Hollister, 6 Pa. St. 449; Hunt v. Hunt, 72 N. Y. 217; Hull v. Hull, 2 Strob. Eq. 174; Hubbell v. Hubbell, 3 Wis. 662; Harrison v. Harrison, 19 Ala. 499; McFarland v. McFarland, 64 Miss. 449; Briggs v. Briggs, 24 S. C. 377.

§ 81. **Sales in bastardy proceedings.**— The statutes under which these proceedings are brought vary. As a rule they are in their nature criminal in form, though civil in character, so far as they seek to subject the property of the defendant; but they are usually summary in their character, and do not differ from other proceedings *quasi in rem* when the defendant is out of the state.[1] It has been held that the action cannot be maintained out of the state where the cause of it arose, but the judgment rendered in such proceedings in the proper jurisdiction is entitled to full force and credit in every other state.[2]

The jurisdiction is so various in the several states that I need say no more than that, where property is seized, the jurisdiction is similar to that of proceedings by ordinary attachment when the defendant has absconded.

As a rule the judgment is to secure the support of the child, and its death suspends the judgment.[3] The expenses for lying-in and for medical attendance are not chargeable when the proceeding is to secure support.[4] It has been held that if the woman marries while *enceinte*, the husband knowing her condition, the putative father is not liable for the support of the child.[5]

Such statutes are held to be constitutional, even when the payment of the judgment is enforced by imprisonment.[6]

§ 82. **Acquiring jurisdiction in proceedings quasi in rem.** Usually jurisdiction is acquired in proceedings *in rem* or *quasi in rem* by invoking the court, by proper application, for an order of seizure. On such application, or by some act of the plaintiff, or some order of the court bringing the property under its notice and setting forth the grounds of seizure or judicial cause for seizure, the property is by writ brought under control of the court, and the officer or person appointed takes charge of it. Jurisdiction once acquired over the property places it in the control of the court; but the court, while it has power to sell perishable property, cannot proceed

[1] State v. Shoemaker, 62 Iowa, 343.
[2] State v. Helmer, 21 Iowa, 370; Graham v. Monsugh, 22 Vt. 543; Boyce v. Railroad, 63 Iowa, 73.
[3] State v. Beatty, 62 Iowa, 343.
[4] See last case.
[5] State v. Shoemaker, 62 Iowa, 343.
[6] Ex parte Donahoe, 24 Neb. 66.

to a judgment without notice to the owner. The jurisdiction is confined to the case.

After the property comes under the care and control of the court and notice has been given, it is possible to lose jurisdiction over the defendant by the refusal of the court to permit him to defend, or by the denial of any requisite guarantied by law which frustrates the very object of service of process; as when a court made a second order of sale after the property had been sold;[1] or where, after one service of process, the de-

[1] Lindsay v. Jaffray, 55 Texas, 626; Smith v. Woolfolk, 115 U. S. 143: "We are of opinion that the decree of the Chicot circuit court, made on the 28th day of October, 1878, was, so far as it concerned Joseph S. Woolfolk and Lucy D., his wife, a final decree in the cause, and they were bound to take no notice of the subsequent proceedings, unless they were served with process or entered their voluntary appearance. By that decree the rights of the parties then before the court, as stated in the original bill, and all the assets of the estate of Craig actually or constructively within the jurisdiction of the court, were disposed of. It is true the receiver was directed by the decree to proceed to collect the available assets of the estate. But, as has been stated, only a small sum, barely sufficient to pay the receiver's compensation, was collected by him, and this he was allowed to retain, by the decree of the court. The petition filed by Todd, and the proceedings thereon subsequent to the decree of October 28, 1868, had no reference to any additional assets collected by the receiver after that date. If the matter set up in the petition of Todd had been offered as an amendment to the original bill when the latter was on final hearing and Woolfolk and wife were before the court, there is no rule of equity pleading and practice or of the jurisprudence of Arkansas by which such an amendment could have been allowed and have become the basis of a decree. Shields v. Barrow, 17 How. 130; Hardin v. Boyd, 113 U. S. 756; Walker v. Byers, 14 Ark. 246. As was said by this court in Shields v. Barrow, *ubi supra*, it is far better to require the complainant to begin anew. To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject. So that, even if the decree made on the original bill was not final, the petition filed by Todd was so radical a departure from the case made and relief prayed by the original bill as to be a new suit and require service of process on the parties made defendant thereto. It instituted a new litigation on new and distinct issues not raised by the original pleadings, and between parties who were complainants in the original cause. . . . It follows that the record of the proceedings and decree of the circuit court of Chicot county, subsequent to the decree made in the case of The Creditors of Junius W. Craig v. Emma J. Wright, executrix, and others, on October 28, 1868, was not binding upon Woolfolk and his wife, and could not be received in evidence against them. As this record contained the only proof offered by the appellants of any set-off in be-

fendant's answer was stricken from the files improperly, and the property condemned without a hearing; that amounted to a recall of the process.[1]

Where the return of process shows an insufficient service, but the judgment or decree shows recitals or findings in favor of the jurisdiction of the court, a presumption arises that there was other proof of service than that contained in the return, and the findings prevail *prima facie*.[2] If the court is one of general jurisdiction, a presumption is indulged in that necessary papers in a cause originally existed and were sufficient in form and have been lost, particularly when considerable time has elapsed after the proceedings were had; as a presumption that officers did their duty is indulged in such cases.[3]

§ 83. **Void judgments cannot be validated.**— There can be no curative statute passed validating judicial sales, where there has been no service of process or appearance, or validating judgments in any action if they are void because of the want of jurisdiction, either over the subject-matter or the parties.[4] Nor has the legislature power to authorize an adjudication against a person without giving him an opportunity to defend.[5] If a sale or any judgment or decree was void, then it was a nullity; and the plaintiff held his debt precisely as if no proceedings had been had. Hence, any legislation seeking to declare a void proceeding valid, would be taking away the property of a citizen by a legislative edict, and without process of law.[6] Such a proceeding or act would be in viola-

half of any one whatever against the mortgage debt due from Todd to Woolfolk, which the present suit was brought to enforce, it follows that the defense of set-off pleaded in the answers of the appellants failed for want of proof, even conceding that they were entitled to make the set-off."

[1] Windsor v. McVeigh, 93 U. S. 274.

[2] Moore v. Starks, 1 Ohio St. 372; Benson v. Cilley, 8 Ohio St. 613.

[3] Doolittle v. Holton, 28 Vt. 819; Hurley v. Barnard, 48 Texas, 83; Alexander's Heirs v. Maverick, 67 Am. Dec. 693; S. C. 18 Tex. 179; Seward v. Didier, 16 Neb. 58; Whitman v. Fisher, 74 Ill. 147; Stevenson's Heirs v. McReary, 51 Am. Dec. 102; S. C. 12 Sm. & M. (Miss.) 9.

[4] State v. Squires, 26 Iowa, 340; Hart v. Henderson, 17 Mich. 218; Lane v. Nelson, 79 Pa. St. 407; Pryor v. Downey, 19 Am. Rep. 656; S. C. 50 Cal. 388.

[5] McDaniel v. Correll, 68 Am. Dec. 587; S. C. 19 Ill. 226.

[6] Nelson v. Rountree, 23 Wis. 367. The legislature may change the burden of proof by enacting that proceedings theretofore taken in a court of special or limited jurisdiction

tion of the provision of the constitution that prohibits a person from being deprived of his property except by due process of law, or the law of the land.[1] It would be taking the property of one and giving it to another. This doctrine is a clear circumstance, if not a positive one, holding (and it is in effect) that, in proceedings strictly *in rem*, notice is not necessary in procuring an interlocutory order, and that such notice is not jurisdictional.

shall be presumed *prima facie* to have been taken rightfully, and thus compel a person assailing such proceedings to show that the court never acquired jurisdiction. Chandler v. Northrop, 24 Barb. 129.

[1] Norman v. Heist, 40 Am. Dec. 493; S. C. 5 W. & S. (Pa.) 171; Greenough v. Greenough, 11 Pa. St. 489; Bagg's Appeal, 43 Pa. St. 512; Shonk v. Brown, 61 Pa. St. 320; Richards v. Rote, 68 Pa. St. 255; State v. Doherty, 60 Me. 504; Pryor v. Downey, 50 Cal. 388; Stevens v. Enders, 1 Green (N. J.), 271.

CHAPTER X.

CRIMINAL JURISDICTION.

Jurisdiction over crimes — The legislature may punish all crimes against the state or against persons, whether in or out of the territory — Conflict of jurisdiction upon this subject — The state punishes without reference to citizenship — Forging securities out of the state punishable — Counterfeiting coin punishable — Piracy on high seas punishable — When the crime is committed out of the state, congress may punish in any district where fugitive is found — Indictments must be in jurisdiction where crime is committed in the state — Court must have jurisdiction to render the judgment it did . . . . . § 84

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§ 84. Jurisdiction over crime.— The extent of the jurisdiction that the state has over crime and the violators of its laws has not as yet been very clearly settled by the courts, some judges seeming to hold that it may punish all crimes against itself or against other states by all persons in all places. This appears to be the view of Chief Justice Taney.[1]

[1] Holmes v. Jennison, 14 Pet. 568: "But if the state possesses the power of delivering up fugitives from justice who, having committed offenses in a foreign country, have fled to this for shelter, the power, as known to the laws of nations, is not confined to the subjects or residents of the country where the offense was committed. It is limited only by the policy of the state upon whom the demand is made. And if the surrender of Holmes is not repugnant to the constitution of the United States, there is nothing in that instrument that forbids the delivery up of a citizen of any other state, when found within its borders, who may be demanded by a foreign government upon the ground that he has committed some offense within its territory. And if this power remains with the states, then every state in the Union must determine for itself the principles on which they will exercise it, and there will be no restriction upon the power but the discretion and good feeling of each particular state. Again, the question under this *habeas corpus* is in no degree connected with the power of the states to remove from their territory any person whose presence they may think dangerous to their peace, or in any way injurious to their interests. The power of the states in that respect was fully considered by this court and decided, in the case of New York v. Miln, 11 Pet. 102. Undoubtedly, they may remove from among them any persons guilty of or charged with crimes; and may arrest and imprison them in order to effect this object. This is a part of the ordinary

Others have held to the theory of what is known as territorial jurisdiction, and declared that each state has jurisdiction of all offenses when the offenders at the time they committed them were within its territory, and that it has jurisdiction of no other offenses. Jurisdiction is acquired, not because of the fact that the criminal was at the time of the commission of the offense a subject of the state, but because the offense was against the law of the sovereignty.

The state punishes all who offend against its laws because the crime is committed within it, and it punishes, when jurisdiction is acquired over the person, all who commit crime, either subject or foreigner, for criminally assailing the rights of its citizens.[1] The state has undoubted jurisdiction to pun-

police power of the states, which is necessary to their very existence, and which they have never surrendered to the general government. They may, if they think proper, in order to deter offenders in other countries from coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction. In all of these cases the state acts with a view to its own safety, and is in no degree connected with the foreign government in which the crime was committed. The state does not co-operate with a foreign government, nor hold any intercourse with it, when she is merely executing her police regulations. But in the case of Holmes it is otherwise. The state acts not with a view to protect itself, but to assist another nation which asks its aid. Holmes is not removed from the state of Vermont, as a man so stained with crimes as to render him unworthy of the hospitality of the state; but he is delivered up to the Canadian authorities as an act of comity to them. This is not the exercise of a police power which operates only upon the internal concerns of the state, and requires no intercourse with the foreign country in order to carry it into execution; it is the comity of one nation to another, acting upon the laws of nations, and determining for itself how far it will assist a foreign nation in bringing to punishment those who have offended against its laws."

[1] Waiving the first question, as to whether crimes cognizable by the United States are subject to the limitation just stated, we are obliged to give a decided negative to the second question, and to maintain that the place where the crime takes effect, and not the place where the offender at the time stood, is the place of the commission of the crime. The history of the federal government, in its several departments, abounds with cases in which persons were put on their trial in districts in which they were not present at the time of the commission of the offense. We must, in fact, take the amendment before us in connection with the second section of the third article of the constitution, which provides that criminal trials "shall take place where crimes have been committed; but when not committed in any state, the trial may be at such place as the congress may by law have directed." That the place of the commission of the crime

ish any one who forges securities, counterfeits coin or commits piracy on the high seas; and the last clause of article 3, section 2, of the constitution of the United States, provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."[1] But ordinarily the crime must be prosecuted in the county in which it was committed, unless the venue is changed; and it is only the law of necessity that gives jurisdiction elsewhere.[2] The court must have jurisdiction over the subject-matter, over the person of the defendant, and have power to render the very judgment it did render, and the venue must be correctly laid.

The purpose of punishment is to prevent the offender from committing crimes in the future. Old offenders should be more severely punished than those who have committed but one offense. Crime can only be punished under the law. Self-defense is a natural right to prevent crimes against one's person, property or family, and often against other innocent persons; but that right cannot be exercised to punish crimes already perpetrated. The object of punishment is not merely reform, it is retributive justice. The true rule is, crime must be punished; and it is a distinctive prerogative, to be exercised judiciously by every government, even a *de facto* one.[3]

is not necessarily the place where the offender stood at the time when the crime was committed, in the opinion of those concerned in the early construction of the constitution, is further illustrated by the fact that congress, in execution of the power given by the constitution to "define and punish such piracies and felonies committed on the high seas, and offenses against the law of nations," proceeded, in one of its earliest sessions, to provide for the punishment of offenses committed at sea. Few questions, in fact, claimed earlier and more conspicuous attention from the executive than those which concerned the arrest and punishment at home of offenses against our sovereignty, or against the law of nations abroad. And for the purpose of providing a specific place of trial in such cases, it was prescribed by statute that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district in which the offender is apprehended, or into which he may be first brought."

[1] Art. 6, Const. U. S.

[2] This subject is discussed more fully in the next following section.

[3] According to President Woolsey, the retribution which he vindicates

§ 85. Crime — Definition. — Crime is the intentional commission or omission of any act, in violation of the public law of any sovereignty, either forbidding the act or commanding it to be done.[1] Every sovereign power has the right to forbid the doing of any act that is in its nature wrong, or which may disturb, overthrow or injuriously affect its power; and has the further right to require its own citizens to assist it in supporting such power when they can. The individual need not be on the soil or within the territory of the sovereignty, or owe it allegiance, if the act done is injurious to the sovereignty itself.[2] A person may be guilty of piracy on the high

assumes "that moral evil has been committed by disobedience to rightful commands; that according to a propriety which commends itself to our moral nature, it is fit and right that evil, physical or mental suffering, or shame should be incurred by the wrong-doer, and that in all forms of government over moral beings there should be a power to decide how much evil ought to follow special kinds and instances of transgression. . . . Its province (that of the state) is confined to such actions as do harm to the state, or to interests which the state exists to protect. . . . Its object in punishing is not, in the first instance, to punish for the sake of punishing, because so much wrong demands so much physical suffering; but to punish — punishment being in the circumstances otherwise right — not directly for the ends of God's moral government, but for ends lying within and far within that sphere." Woolsey's Political Science, § 107.

[1] "A crime or misdemeanor (*delict*) is an act committed or omitted in violation of a public law either forbidding it or commanding it." 4 Stephen's Com. 89, note, adopted in Nasmith's Institutes, 63. "A crime may be provisionally defined to be an act which the state absolutely prohibits, or a forbearance from an act which the state absolutely commands to be done, the state making use of such a kind and measure of punishment as may seem to render such prohibition or command effectual." Amos on Jurisprudence (London, 1872), 286.

[2] A party who in one jurisdiction puts in operation a force which does harm in another jurisdiction is responsible in both jurisdictions for the harm. Wharton's Crim. Law, 248, 284, note. See Wharton's Confl. of Laws, secs. 877–921; Whart. Cr. Ev. sec. 112; Wooten v. Miller, 7 Sm. & M. 380; State v. Chapin, 17 Ark. 561; Hanks v. State, 13 Tex. App. 289, accepting views of text. In Indiana a statute making a foreign principal punishable for his agent's criminal acts within the state has been held to apply only to persons who are principals in the commission of the offense. Johns v. State, 19 Ind. 421. That he is responsible in the place where he starts the wrong will be hereafter seen. His responsibility in the place where the wrong takes effect is also generally recognized. Thus, it has been held that the originator of a nuisance to a stream in one county, which affects such stream in another county, is liable to prosecution in the latter county (Stillman

seas, and commit a crime against every civilized nation. He may levy war, stir up sedition, and aid persons in so doing, and be punishable by the nation wronged, provided it can get

v. White Rock Co. 3 Wood. & M. 538. See R. v. Burdett, 4 B. & Ald. 175, 176; Bulwer's Case, 7 Co. 49; Com. Dig. Action, N. 3, 11, though the place where nuisance originated has jurisdiction); that the author of a libel uttered in one country and published by others in another country, from which he is absent at the time, is triable in the latter country; that such is the case where a man in one country incites an agent in another country to commit perjury (Com. v. Smith, 11 Allen, 243); that he who on one side of a boundary shoots a person on the other side is amenable in the country where the blow was received (1 Hale, P. C. 475; U. S. v. Davis, 2 Sumn. 482, cited and approved in State v. Wyckoff, 2 Vroom (N. J.), 68, and the same point taken in Com. v. Macloon, 101 Mass. 1); that he who in one state employs an innocent agent to obtain goods by false pretenses in another state is amenable in the latter state. People v. Adams, 3 Denio, 190, affirmed in 1 Comstock, 173. "The rule," says Chief Justice Beasley (State v. Wyckoff, 2 Vroom, 69), "appears to be firmly established, and upon very satisfactory grounds, that where the crime is committed by a person absent from the country in which the act is done, through the means of a merely material agency, or by a sentient agent who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case — otherwise the anomaly would exist of a crime but no responsible criminal." It has been held that a thief who sends goods by one, not an accomplice in the theft, to a foreign state for sale, is indictable in the latter (Com. v. White, 123 Mass. 430); that the forger in one state of a title of land in another state may be punished in the latter state (Lindsey v. State, 38 Ohio St. 507; Hanks v. State, 13 Tex. App. 289; see Carr, Ex parte, 28 Kan. 1); that he who sells through agents, guilty or innocent, lottery tickets in another state, is amenable in the state of the sale, though he was absent from such state personally; that he who gives poison in one jurisdiction, which acts in another, is responsible in the latter jurisdiction. The overt act of homicide by administering poison, within the meaning of the law, consists not simply in prescribing or furnishing the poison, but also in directing and causing it to be taken; so that if the poison be prescribed and furnished in one county to a person who carried it into another county, and there, under the directions given, takes it and becomes poisoned, and dies of the poison, the administering is consummated and the crime committed, if committed at all, in the county where the person is poisoned. Robbins v. State, 8 Ohio St. 131. And so where a person who, in one county, advises another, by signals, when to commit a highway robbery in another county. State v. Hamilton, 13 Nev. 386. In this case it was proved that there was a conspiracy between the defendants and others to rob the treasure of Wells, Fargo & Co., on the road between Eureka and some point in Nye county, Nevada; that H. was to ascertain when the treasure left Eureka and signal his confederates by a fire on the top of a mountain in Eureka

control of him.[1] He may, being a citizen abroad, injure a citizen of, or the property of, or levy a piratical war against, a friendly government, and be punished by his own government for the act; the same as a father may punish a recreant child who has injured a neighbor's property, person, possession or servant. Crime as a rule being *malum in se*, or *malum*

county, which could be seen by them in Nye county, thirty or forty miles distant; that the signals were given by him, and his confederates attacked the stage and attempted to rob the treasure. It was held that H. was a principal, and that though an accessory before the fact is amenable in the place of accessoryship, he may become, in directing the execution of the act, amenable in the place of consummation. In a case for obtaining money by false pretenses in England, the offender being at the time in Russia, his absence was in itself held to be no ground for acquittal; and Lord Campbell, sustained by Baron Parke, declared "that a person may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our courts;" Baron Parke saying "that a person, though personally abroad, might commit an offense in England and be afterwards punished here; as, for instance, if he, by a third party, sent poisoned food to one in England, meaning to kill him, he would be guilty of murder if death ensued, although he could not be amenable to justice until he was within the jurisdiction." "It was a monstrous thing," Sir R. Phillimore is reported as saying at a meeting of the Law Amendment Society, in 1868, "that any technical rule of venue should prevent justice from being done in this country on a criminal for an offense which was perpetrated here, but the execution of which was concocted in another country." Hence we may hold that presence at the crime is not an essential condition of indictability.

[1] Among the numerous cases of piracy which have been adjudicated in our courts, where is the case in which the defense of foreign allegiance was ever set up? What counsel would have the audacity to claim that because a pirate was the subject of a foreign prince, therefore he could not be tried for his piracy in the courts of the United States? At the outset, in answering this question, we are arrested by the sixth amendment to the constitution of the United States: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the assistance of counsel for his defense." In Ham v. State, 4 Tex. App. 645, the court held that a statute providing that persons forging titles to lands in that state should be liable to indictment whether the offense should be committed in or out of the state was constitutional, and the conviction of one who committed a forgery in Missouri was sustained thereunder.

prohibitum, it almost universally embraces a moral wrong; and the sovereign power of a government, under the law of self-preservation, may protect itself and punish any injury committed against it.[1] A person cannot, because he is domiciled in Mexico, forge the securities of the United States and escape, if he come within the reach of the latter government.[2] It matters not that he cannot be extradited; he has commit-

[1] As has been seen, accessories in treason and in misdemeanors are principals. The common-law rule is that the accessory is to be tried at the place where his guilty act of accessoryship took place (that an accessory before the fact may be tried in the place of accessoryship, see further, State v. Moore, 6 Fost. 448; People v. Hall, 57 How. Pr. 342; State v. Wyckoff, 2 Vroom, 65; Johns v. State, 19 Ind. 421; State v. Knight, 1 Taylor (N. C.), 65; Riley v. State, 9 Humph. 646; State v. Chapin, 17 Ark. 561; People v. Hodges, 27 Cal. 340; and so of an accessory after the fact. Tully v. Com. 13 Bush, 142); though by statutes in several of the states he may be tried in the place having jurisdiction of the act (see 4 Wendell's Blackstone, p. 305; Com. v. Pettes, 114 Mass. 307; under the 2d and 3d Ed. VI., an accessory after the fact, it is said, is triable in the county where he was accessory, but not in that where the principal offense was committed. 1 Hale, P. C. 623; Baron v. People, 1 Parker, C. R., 246; Tully v. Com. 13 Bush, 142; though see 1 East, P. C. 361, intimating that the trial may be in the place of vicinage or in that of the principal crime; and to that effect see State v. Grady, 34 Conn. 118); and by more recent statutes, making all accessories before the fact principals, the accessory before the fact, or instigator, is triable in the place of perpetration. In conspiracies, by the common law, each conspirator is responsible in any place where any overt act by any of his co-conspirators is done, as well as in the place where the crime is concocted and started. It is so, also, according to the English common law, with treason.

[2] To the United States these considerations are peculiarly important. On our southwest boundary lies Mexico, with whom, if we have a treaty for extradition, it is a treaty of very recent adoption and of capricious application; while the state of municipal law in Mexico is such that it is hopeless to look to Mexican courts to punish offenses concocted in Mexico for execution in our own land. Even if we should ask for justice in such cases the answer would be: "Take care of yourselves. The crime was to be done on your territory; it was, therefore, a crime on your soil; how can we punish a man for something done in another state?" Even should this pretext fail, corruption, or national prejudice, or common interest would succeed in rendering abortive any attempt at prosecution. In the meantime if we announce the principle that Mexico alone has jurisdiction in such cases, what would become of us? The Mexican side of our boundary would be the undisturbed abode of hordes of depredators who would make our country a desert for many miles deep. Parties of armed marauders could come down in a swoop, pillage, ravish and murder in every village or farmhouse as far as swift traveling horses

ted an offense, and may be punished because the act done was prejudicial to the government, and a crime against its laws. Hence, if a party within one jurisdiction puts in operation any force, or does any act, prejudicial to another jurisdiction, and punishable if done therein, and which may result in harm to the latter, although he may be responsible in both, he is punishable in either.[1] If a person in England could hire a person to commit murder in the United States, and afterwards come to this country and enjoy the protection of our laws, it would be a reproach on them.

While crime may be particularly injurious to private individuals, the government, in its sovereign capacity, because of the nature of the act and its odiousness, punishes the individual as an example to others, and to prevent such public wrongs to its citizens, as well as to inflict the penalty upon the offender. The right of the sovereignty to protect itself is a self-evident right. The crime, if prejudicial to the interest of the state, or its citizens, arises from the wrongful act. The mode of punishment, the place of trial and means of prevention rest in the government, and is a thing of statute.

If the act from its nature may be committed, concocted or set in motion at any place outside of the territory as well as in, no good reason can be shown why the offender, when caught, should be permitted to plead the exemption because of place. The state, while its territorial limits may be small,

could go, and there, in their security, laugh insolently at the cries of their victims for vengeance.

[1] 1 Whart. Criminal Law, § 289: "When a nuisance is created in one jurisdiction and operates in another jurisdiction, the courts of both jurisdictions, according to the better opinion, have cognizance of the offense, though in some states it is held that where the injury is exclusively to real estate, the redress must be sought in the jurisdiction of the real estate." That a diversion of water made in one state which does injury in another is cognizable in the former state, see Stillman v. White Rock Co. 3 Wood. & M. 538; Foot v. Edwards, 3 Blatch. 310; Rundle v. Canal Co. 14 How. 80; Miss. & Mo. R. R. v. Ward, 2 Black, 485; Worster v. Lake Co. 5 Fost. 525; State v. Lord, 16 N. H. 357; Manville Co. v. Worcester, 138 Mass. 89; S. C. 80 Alb. L. J. 409; State v. Babcock, 30 N. J. L. 29; Commonwealth v. Lyons, 1 Penn. L. J. Rep. 497; Oliphant v. Smith, 3 Pen. & Watts, 180; Eldred, In re, 46 Wis. 530; Thayer v. Brooks, 17 Ohio, 489; Pilgrim v. Mellor, 1 Ill. App. 448; Armendiaz v. Stillman, 54 Tex. 623, where the water was diverted in Texas and the injury done in Mexico. See remarks of Judge Story in Slack v. Walcott, 3 Mason, 508; note 2, p. 218.

may protect its flag anywhere, or the rights of its citizens, if it can do so without trespassing on another jurisdiction.[1]

§ 86. The power to punish crime is a sovereign power, and ranges as wide as the flag.— While the jurisdiction of the state over the ocean has been held to be limited by a cannon-shot from low-water mark,[2] yet this rule is by no means universal, as a ship is in law viewed as a part of the country whose flag she bears; and in conformity to this rule all offenses committed in ships may be punished by the sovereign to whom the vessel belongs, whoever may be the offender or wherever the place.[3] All piracies committed on the high seas or in

[1] See n. 1, p. 220 and, n. 1, p. 221.

[2] What is the jurisdiction of a state over the ocean? To this question, which is of importance in view of the distinction noticed in the last section, we may reply that a sovereign has jurisdiction of the sea bounding his coast to the distance of a cannon-shot from low-water mark. Lawrence's Wheat., 321, 715, note. See Com. v. Peters, 12 Met. 387; Manley v. People, 8 Seld. 295.

[3] As a rule, a ship is viewed as part of the country whose flag she bears, and in conformity with this principle all offenses committed on shipboard are regarded as cognizable by the sovereign to whom the ship belongs, no matter to what nationality belongs the offender. R. v. Lopez, R. v. Sattler, Dears. & B., C. C. 525; 7 Cox, C. C. 431. In R. v. Serva, 1 Den., C. C. 104, it was held, according to the summary of Sir J. F. Stephen, "that the criminal law of England does not apply to foreigners on board a ship unlawfully in the custody of an English ship of war." On the other hand, "the liability," he adds, "to the English criminal law of foreigners on board English merchant vessels has been clearly established, even if they are on board without their own consent, and even if a foreign court has concurrent jurisdiction over them. This was decided by three cases. R. v. Lopez, *supra;* and R. v. Anderson, decided in 1868, L. R. 1 C. C. R. 161, and R. v. Sattler, decided in 1858." In England, it is true, all rivers in the country, until they flow past the furthest point of land next the sea, are held within the jurisdiction of the courts of common law, and not of the court of admiralty (see 1 Co. 175; 3 Inst. 113; 3 T. R. 113; 1 Hawk. ch. 37, sec. 11); and where the sea flows in between two points of land in the country, a straight imaginary line being drawn from one point to the other, the common law is held to have jurisdiction of all offenses committed within that line (see as to the United States, 1 Kent, Com. 30; Com. v. Gaines, 2 Va. Cas. 172), the court of admiralty of all offenses committed without it. But see R. v. Bruce, R. & R. 243. But of crimes not merely on the high seas, but on or in creeks, harbors, ports, etc., in foreign countries, the court of admiralty is said to have unlimited jurisdiction, and such offenses may consequently be piracies. Thus, where on an indictment for larceny out of a vessel lying in a river at Wampa, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay, the judges held that

creeks, harbors or ports are punishable by any sovereignty whose vessel or property is so attacked.[1] In England British seamen, abroad, in port or on ships, are punishable in her courts. It is claimed by Mr. Wharton that each state has jurisdiction of all offenses which assail its rights or the rights of its subjects, without regard to the place where the offender was at the time the offense was committed.[2] The real theory of jurisdiction rests on the ground that the act or omission was against the sovereignty. The rule should be, we will punish all who offend against our sovereignty, if we can obtain control of the offender, without any regard to his nationality or place of the offense; and in this view alone rests true national protection.[3]

the admiralty had jurisdiction, it being a place where great ships go. R. v. Allen, 1 Mood. C. C. 494. As to offenses committed on the coast, the admiralty is ruled to have exclusive jurisdiction of all committed beyond low-water mark; and between that and the high-water mark, the admiralty jurisdiction is asserted over all offenses committed upon the water when the tide is in; it being admitted that courts of common law have jurisdiction over offenses committed upon the strand when the tide is out. All the other parts of the high sea are indisputably within the jurisdiction of the admiralty.

[1] See next note.

[2] 2 Whart. Crim. L. sec. 1862, citing Bollman, Ex parte, 4 Cranch, 75; United States v. Magill, 1 Wash. C. C. 463; United States v. Thompson, 1 Sumner, 168. In this country a vessel lying in an open roadstead of a foreign country is held to be on the high seas. United States v. Pirates, 5 Wheat. 184; United States v. Gordon, 5 Blatch. C. C. 18. And so also of a vessel lying in a harbor, fastened to the shore by a cable, and communicating with the shore by boats and not with any inclosed dock or at any pier or wharf. United States v. Seagrist, 4 Blatch. C. C. 420. With us it is not necessary, to give the federal courts jurisdiction, that the vessel should have belonged to citizens of the United States; it is enough if she had no national character, but was held by pirates or persons not lawfully sailing any foreign flag. And the offense is equally cognizable by the United States courts if committed on board of a foreign vessel by a citizen of the United States, or by a foreigner on board of a United States vessel, or by a citizen or foreigner on board of a piratical vessel. United States v. Pirates, 5 Wheat. 184; Ex parte Bollman, 1 Cranch, C. C. 373; United States v. Kessler, 1 Baldwin, 20. But it is otherwise with acts of piracy committed by citizens of a foreign country in foreign vessels. Id.; United States v. Palmer, 3 Wheat. 632.

[3] But the authorities go beyond this limit. "Where an act," says Judge Vredenburgh (State v. Carter, 3 Dutch. 501) in 1859, in the supreme court of New Jersey, "is *malum in se*, is done in solitudes, upon land where there has not yet been extended any supreme human power, it may be

Crime may be committed on an island peopled only by savages or not inhabited at all; and the national jurisdiction arises from protection of its rights and citizens and obtaining control of the offender.

The provision in the United States constitution [1] which says: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," etc., is not a bar to the trial of offenses against the sovereignty committed beyond any district, state or territory; and the above amendment to the constitution must be read in connection with the third article thereof, which provides that criminal trials "shall be held in the state where the said crimes shall have been committed; *but when not committed in any state the trial may be at such place or places as the congress may by law have directed.*" The place of the commission of the crime is not that where the offender was when the crime was committed; he may have made the preparations for its commission abroad, and intrusted the execution of his plans to an active or inanimate agent who or which will eventually accomplish the desired end. The place where the injury is done may have jurisdiction. Air, water, force of gravity or electricity may be a means, as science advances, for committing offenses, though the perpetrator may be miles away, and never within the jurisdiction.[2] We concede the rule of territorial jurisdiction as usually adopted by English and American courts, but we have no doubt of the power and right of the state to adopt due and ample means to meet the exigencies of the occasion in punishing crime irrespective of the cunning of the offender.[3]

that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice*, arrogate to itself the prerogative of omnipotence and hang the pirate of the land as well as of the water. In 1878 the British government went so far as to sustain the execution, on board the ship Beagle, at sea, of a South Sea Islander, charged with the murder on shore of an Englishman. See Sat. Rev. Aug. 10, 1878, 169. And see this case discussed by the author in 4 South.

[1] See note 1, p. 227.

[2] See note 1, p. 227.

[3] That at common law this principle holds good is illustrated by the numerous cases which hold that corporeal presence at a crime is not necessary to convict an accessory before

§ 87. Summary of federal and judicial power.— The constitution of the United States gives congress power to punish offenders for counterfeiting the coin or securities of the United States, to define and punish piracies and felonies committed on the high seas, also offenses against the law of nations, and to make rules for the government of the land and naval forces, to exercise jurisdiction over the seat of government, and over all places purchased for forts, arsenals, magazines, dock-yards and other needful buildings, and make necessary laws for carrying the power into execution, and to enforce the rights established by the fourteenth and fifteenth amendments. Congress has passed laws forbidding and punishing heinous offenses against the United States pertaining to the protection of the government that need not be here defined or set forth, punishing offenses committed at home or abroad, and punishing many common law-offenses committed on high seas.[1] Our

the fact, or even the principal in the second degree. Nor can we by any other mode of construction explain the jurisdiction already mentioned as assumed by us in cases of offenses against our sovereignty committed by false swearing before our consuls abroad and forgery of our securities abroad. The crime takes effect in this country though the perpetrator was at the time in another land. The same reasoning applies to the jurisdiction assumed in most of our states over homicide where the death was on the boundary, though the offender at the time stood outside of the boundary. Statutory, if not common-law, jurisdiction is in like manner claimed over larcenies and embezzlements effected intraterritorially by an agent at the time extraterritorially resident. And it is now settled that he who organizes abroad an offense consummated within our borders is responsible to us although he may never have trod our soil. Thus he who abroad employs an agent to obtain by false pretenses goods in one of our states is responsible to such state for obtaining such goods by false pretenses. People v. Adams, 3 Denio, 190; affirmed, 1 Comst. 178; R. v. Garrett, 6 Cox, C. C. 260. See State v. Grady, 34 Conn. 118. And he who abroad incites an agent to commit the offense of perjury in one of our states is liable to indictment in such state for the perjury. Commonwealth v. Smith, 11 Allen, 243. It is true that in some cases we have intimations that this jurisdiction is not to be exercised where the agent is ignorant of the character of the offense he is employed to perpetrate, or at least is innocent of any guilty purpose as to such perpetration. State v. Wyckoff, 2 Vroom, 65.

[1] Butler's Case, 13 Co. 55; 3 Inst. 113; R. v. Prowes, 1 Moody, C. C. 349; R. v. Debruiel, 11 Cox, C. C. 207; and see Whart. Cr. Ev. sec. 111. In an English case, decided in 1875, it was the prisoner's duty as country traveler to collect moneys and remit them at once to his employers. On the 18th April he received money in county Y.; on the 19th and 20th he wrote to his employers from Y., not mention-

laws recognize the right to punish, irrespective of venue or locality, where the ordinary rules do not meet the exigency of the occasion. The right, then, is sanctioned by congressional legislation as well as by the laws of the civilized countries of the world.[1]

§ 88. Criminal jurisdiction of federal courts — Statutory. The jurisdictions of the federal courts are purely statutory, and the common law is only used as a rule for the exercise of

ing that he had received the money; on the 21st he wrote to them again from Y., thereby intending them to believe that he had not received the money. The letters were addressed to and received by his employers in county M., and written and posted in county Y. It was held that the prisoner might be tried in county M. for the offense of embezzling the money. R. v. Rogers, L. R. 3 Q. B. D. 28; 14 Cox, C. C. 22. See Com. v. Uprichard, 3 Gray, 434; People v. Burke, 11 Wend. 129; Hemmaker v. State, 12 Mo. 453; State v. Williams, 35 Mo. 229; Cummings v. State, 1 Har. & J. 340; McFarland v. State, 4 Kan. 68; State v. Seay, 3 Stew. 123; Lee v. State, 49 Ala. 44; State v. Johnson, 38 Ark. 568; Hanks v. State, 13 Tex. App. 289; § 85, note 4.

[1] United States v. Dawson, 15 How. 487: "It has been supposed that a provision in the sixth amendment of the constitution of the United States has a bearing upon this question, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. The argument is that since the erection of the new district out of the nine western counties in the state, together with the Indian country, it is not competent for the circuit court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires the district within which the offense is committed and the trial is to be had must be ascertained and fixed previous to the commission of the offense. But it will be seen from the words of this amendment that it applies only to the case of offenses committed within the limits of a state; and whatever might be our conclusion if this offense had been committed within the state of Arkansas, it is sufficient here to say, so far as it respects the objection, that the offense was committed out of its limit and within the Indian country. The language of the amendment is too particular and specific to leave any doubt about it: The accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall be committed, which district shall have been previously ascertained by law. A crime, therefore, committed against the laws of the United States, out of the limits of a state, is not local, but may be tried at such place as congress shall designate by law. This furnishes an answer to the argument against the jurisdiction of the court, as it respects venue, trial in the county and jury from the vicinage, as well as in respect to the necessity of particular or fixed districts before the offense."

the jurisdictions so prescribed,[1] and this is true in some of the states.[2] Its rules are applied in determining the offense and its construction; this is so in states where the jurisdiction is thus derived.[3]

Many states have held that their statutes alone cover all offenses cognizable by their criminal courts, particularly the recently admitted states, and that common-law offenses are not cognizable unless re-enacted in the statutes. In such states the common law is resorted to only for the purpose of interpretation.

The common-law rules govern very extensively in construction in all common-law actions in the federal courts, and in *habeas corpus*. Such courts have common-law jurisdiction, it might almost be said. The statute only limits the jurisdiction by restrictions as to citizenship; and when federal questions are involved, the court may be said to be a common-law court, within the scope of the powers delegated.

§ 89. What courts try offenses against the United States. Congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States, although the state courts may exercise concurrent jurisdiction in cases authorized by the laws of the state and not prohibited by reason of the exclusive jurisdiction of the federal courts.[4] Several lines of offenses made criminal by United States statutes are cognizable by the state courts, and the federal statutes give such concurrent jurisdiction to the state courts.[5] But the exercise of such concurrent jurisdiction by the latter courts is not obligatory. Some courts hold otherwise.[6] But congress cannot confer on a state court jurisdiction over offenses against

[1] Wharton's Crim. Law, sec. 253; United States v. Hudson & Goodwin, 7 Cranch, 32.

[2] United States v. Cruikshank, 92 U. S. 564; United States v. Coolidge, 1 Wheat. 415. And see McCullough v. Maryland, 4 Wheat. 316. In Iowa the rule is adopted. Estes v. Carter, 10 Iowa, 400; State v. Lovell, 23 Iowa, 304.

[3] Wharton's Crim. Law, secs. 258–263, inclusive.

[4] United States v. Ames, Boston L. Rep. vol. 9, p. 295; Wharton's Crim. Pl. & Pr. sec. 242.

[5] See below.

[6] 1 Wharton's Crim. Law, sec. 266: "1. Congress cannot constitutionally confer on a state court jurisdiction over offenses exclusively against the federal government. Statutes conferring such jurisdiction do not and cannot bind the state courts as such. 2. Offenses which are directed against the sovereignty of a state, or which directly affect the state or its

the federal government, nor bind the state courts to exercise it.[1] The state must by its own legislation confer the power.

An offense may be a crime against the sovereignty of a state, and be punishable by the state under its laws; and such offense may also be against the sovereignty of the United States, and punishable by the federal courts in one aspect of it, and a state court in another.[2] But offenses exclusively against the state are alone cognizable in the state courts, and the federal courts have no jurisdiction.[3] So cases exclusively

population, are punishable in such state, notwithstanding the fact that such offenses are also directed against the sovereignty of the federal government, unless the constitution gives the federal government exclusive jurisdiction over the offense. Prigg v. Com. 16 Peters, 539, 630. A state court of original jurisdiction, having the parties before it, may, consistently with federal legislation, determine cases at law or in equity arising under the constitution or laws of the United States, or involving rights dependent on such constitution or laws (Harlan, J. in Robb v. Connolly, 111 U. S. 624); and even where the federal courts have exclusive jurisdiction of one aspect of an offense, this does not prevent a state court from prosecuting another aspect of the same offense (United States v. Wells, 15 Int. Rev. Rec. 56); *e. g.*, where the uttering a forged treasury note is prosecuted as an uttering in the federal courts, and as a cheat in the state courts. Whart. Com. Am. Law, sec. 524."

[1] See above note.

[2] "By the terms of the judiciary act," said Ames, J., in Commonwealth v. Felton, 101 Mass. 206, in reference to this point, "the courts of the United States are vested with the exclusive cognizance of all crimes that are made punishable by act of congress, except where the act of congress makes other provision; and it would therefore seem that the crime of embezzlement by a cashier of a national bank located within our territory is taken out of the jurisdiction of our courts. This is at least strongly implied in Com. v. Tenney, 97 Mass. 50." On the other hand it has been held in the same state (Com. v. Barry, 116 Mass. 1) that a larceny committed by an officer of a national bank may be punished in a state court, notwithstanding that he may also be subject to punishment for embezzlement under the United States statute. An acquittal or conviction of either would be no bar for the prosecution of the other. See Com. v. Carpenter, 100 Mass. 204; Morey v. Com. 108 Mass. 433. To the same effect is State v. Tuller, 34 Conn. 280, where it was held that while the state courts cannot exercise jurisdiction of the offense of embezzlement by an officer of a national bank of the property of the bank, they have jurisdiction of the larceny or purloining by such officer of the property of others left with the bank for safekeeping. At the same time it is admitted in Connecticut that offenses against the federal government are exclusively cognizable in federal courts. State v. Tuller, *supra;* Ely v. Peck, 7 Conn. 240; Manley v. The People, 3 Selden, 302. See § 103, note 4.

[3] Perjury in naturalization proceedings, no matter what may be the

within the jurisdiction of the federal courts are alone cognizable by them, and state jurisdiction is excluded unless concurrent jurisdiction is given by statute.[1]

It is said that the enactment of a federal statute defining and punishing a crime against the United States excludes all state jurisdiction, unless it be saved by statute; and this rule applies to both principals and accessories.[2] But where it is held that the federal court had exclusive jurisdiction over the cashier of a national bank for the embezzlement of funds of the bank because it was a breach of trust, the same courts have held the offender might be indicted in a state court for the larceny, although the same evidence supported the conviction introduced on the trial for the breach or embezzlement.[3]

§ 90. Crimes on high seas.— All crimes committed on shipboard on the high seas are cognizable by the sovereignty to which the ship belongs, irrespective of the nationality of the offender;[4] but the jurisdiction of admiralty, in some countries, extends to creeks, rivers, harbors, ports, etc., and it has been held so in England. Admiralty has jurisdiction where ships go, and from the low-water line to shore in high water when tide is in.

All other parts of the sea are under the exclusive jurisdiction of admiralty, as are offenses committed by British seamen in port as well as on ship; and it has been held recently that the central criminal courts of England have jurisdiction over foreigners committing crimes on British ships in foreign rivers. The same rule is adopted in France and Germany.[5]

court in which the false oath is taken, is held to be an offense against the general government, and not punishable in state courts. People v. Sweetman, 3 Parker, C. R. 358; State v. Adams, 4 Blackf. 146; People v. Kelly, 38 Cal. 145; State v. Kirkpatrick, 32 Ark. 117.

[1] Yet we may agree that the state courts have no jurisdiction of perjury before federal land officers (People v. Kelly, 38 Cal. 145; see, also, State v. Pike, 15 N. H. 83; State v. Adams, 4 Blackf. 146); and of perjury in federal judicial investigations (Bridges, Ex parte, 2 Woods, 428; S. C. under name of Brown v. United States, 14 Am. L. Reg. (N. S.) 566; State v. Shelley, 11 Lea, 594), though it may be otherwise as to special aspects of perjury under federal statutes.

[2] See above.

[3] State v. Tuller, 34 Conn. 280; S. C. 1 Nat. Bank Cases, 375; Commonwealth v. Barry, 116 Mass. 1.

[4] See p. 228, n. 3.

[5] Wharton's Crim. Law, § 269, n. 6. This is in accordance with the ruling in United States v. Davis, 2 Sumn. 482. See Wharton's Conf. Laws, 861.

By statute in the United States the jurisdiction of the federal courts extends to piracies, revolts, homicides, robberies and malicious injuries to the ship, and some other crimes on the high seas, by any or all persons, without regard to nationality, and also on American ships in port; and the place of trial of the crime committed out of the jurisdiction of the United States may be in the district where the offender is apprehended or in which he may be first brought.[1]

§ 91. Offenses of subjects abroad.— It is now believed that any subject of the government should be held responsible to the courts of the country for all offenses committed in a barbarous country or an unsettled one. The exercise of this jurisdiction is an essential attribute of sovereignty.[2] This territorial restraint rests on no steadfast foundation, and has been disregarded by legislatures in both England and America. The better opinion is that the subject may be held responsible to either the United States or the state for offenses against them committed anywhere, and this now seems to be the law of the civilized world. Where else can jurisdiction rest if not in the court of the sovereignty injured? It is the statute of that sovereignty that is violated. By the United States statutes, and in pursuance of treaties between the federal and several other governments — China, Japan, Siam, Egypt and others, — the consuls and ministers of the former to and in such countries have jurisdiction to arraign and try citizens of their government who are charged with offenses against the laws of such countries. Such statutes have been extended so as to give like power to commercial agents and consuls at several islands not inhabited by civilized peoples, or with which this government has no treaty.[3] Political offenders may, by statute, also be punished for political offenses against the United States, though committed abroad, if citizens owing allegiance to its government.[4] We need not pursue this subject longer, as it more properly belongs to a branch of the criminal law; but we say we believe that any government has the right to punish any person who commits a crime against

[1] See United States v. Dawson, 15 How. 467. See p. 224, n. 1.

[2] See U. S. R. S. secs. 4087, 4088 and 4090.

[3] R. S. U. S. secs. 4085–4098.

[4] Sec. 85, and notes.

it, or against its citizens or their property, irrespective of the place where it was committed, if the act done affects the sovereignty of the government and is in direct violation of its laws. The presence of the prisoner at the place of crime is not a condition essential to the power of the law-makers to punish him, but rather to the power delegated by the legislature to the courts. It is not a jurisdictional question as much as a legislative one.[1] On changes of venue from the proper county in criminal cases the accused is tried out of the county where the crime was committed, and such trial is deemed legal and proper. Actual presence of the criminal at the scene of crime is not, and should not be, held an essential ingredient to his conviction, if his act caused or aided its perpetration.[2]

§ 92. Venue where crime is committed by an agent or concocted abroad or the defendant was not present at its commission.— A party who in one jurisdiction or one county may put in operation a force that does harm in another may be liable in either for the offense.[3] Persons accused of treason or misdemeanors are at common law indictable in the place where the criminal act took place or the place having jurisdiction of the principal act; so in conspiracies, each conspirator is responsible and indictable where any act was done by any co-conspirator, as well as at the place where the crime was concocted.[4] A libel may be written in one place and pub-

[1] See sec. 86, and notes.

[2] Gould & Tucker's Notes on U. S. R. S. sec. 4079: "The judicial power of consuls depends upon treaty stipulations. Dainese v. Hale, 91 U. S. 13; Re Aubrey, 26 F. R. 851; The Elwine Kreplin, 9 Blatch. 438; 2 A. G. Op. 378; Dainese v. United States, 15 Ct. Cl. 64; The William Harris, 1 Ware, 372; United States v. Craig, 28 F. R. 801. Unless restricted by treaty a United States district court may, in the exercise of its discretion, assume jurisdiction of a claim for wages against a foreign vessel, especially when there is no consul within the court's territorial jurisdiction. The Amalia, 3 F. R. 652; The Salomoni, 29 id. 534."

[3] In United States v. Davis, 2 Sumner, 482, homicide was committed by shooting a ball from a gun on a United States vessel in a foreign port, killing a person in a foreign ship. The defendant was held not to be indictable in a United States court. But this may be sustained on the ground that the shooting as well as the death was in a foreign port.

[4] R. v. Girdwood, 1 Leach, 169; R. v. Johnson, 7 East, 65; Com. v. Blanding, 3 Pick. 304; People v. Griffin, 2 Barb. 427; People v. Rathbun, 21 Wend. 533; Com. v. Gillespie, 7 S. & R. 469. As to libel, see Dana's Case, 7 Ben. 1. In Rogers v. State, 11 Tex. App. 608, it was held that a party co-operating out of Texas in forging a deed to take

lished in another; a gun may be fired in one county and do harm in another; an explosive package or infernal machine may be sent from one state to another, and a stream of water polluted in one place may cause injury in another; or a man may employ a ruffian to commit murder in a neighboring state.[1] It would be a monstrous doctrine to assert that a man should escape from the consequences of crime perpetrated by him, simply because of his using some inanimate agent or innocent person to put his criminal designs into execution, on the technical grounds of venue.[2]

We should remark that if an act done in one state was not an indictable offense if its consequences were felt there, the rule would be different; but if done by express intention to create or do an injury in the state where it was in fact intended

effect in Texas is indictable in Texas. See Rogers, Ex parte, 10 Tex. App. 655. But this does not include jurisdiction of the place of forgery. United States v. Worrall, 2 Dall. 388; Whart. St. Tr. 189; R. v. Burdett, 4 B. & A. 95; Perkin's Case, 2 Lewin, 150; 2 East, P. C. 1120; 4 Wend. Blackst. p. 305. See R. v. Jones, 4 Cox, C. C. 198; 1 Den. C. C. 551; Johns v. State, 19 Ind. 421; Green v. State, 66 Ala. 40.

[1] R. v. Jones, 1 Den. C. C. 551; T. & M. 270. In R. v. Holmes, L. R. 12 Q. B. D. 23; 15 Cox, 343; 49 L. T. (N. S.) 540, it was held that where A. posted in England a letter to France, containing a false pretense, which induced the receiver of the letter to send money to A., A. was indictable in England for the false pretense. State v. House, 55 Iowa, 466. As will presently be more fully seen, where a letter containing a fraudulent non-accounting of goods by an agent is received by his employers in M. county, the latter county has jurisdiction of the offense. R. v. Rogers, 14 Cox, C. C. 22; L. R. 3 Q. B. D. 28. See R. v. Treadgold, 14 Cox, C. C. 220; 39 L. T. (N. S.) 291.

[2] See §§ 85, 86, and notes. R. v. Ferguson, 2 Stark. (N. P.) 489; Com. v. Corlies, 3 Brews. 575; S. C. 8 Phila. 450; People v. Arnold, 46 Mich. 268. "It has been said by the court of king's bench that there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, ought not to be tried where one overt distinct act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war. R. v. Brisac, 4 East, 171. So where the conspiracy as against all the defendants having been proved by showing a community of criminal purpose, and by the joint co-operation of the defendants in forwarding the objects of it in different counties and places, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of the defendants in the county where the trial was had in prosecution of the conspiracy." Com. v. White, 123 Mass. 430; Com. v. Corlies, 3 Brews. 575; S. C. 8 Phila. 450; Bloomer v. State, 48 Md. 521; Johns v. State, 19 Ind. 421; State v. Chapin, 17 Ark. 561; State v. Hamilton, 13 Nev. 386.

to operate, and the act was a crime at common law, the prisoner should be punished, although it was not criminal if done against the state where committed. Some conflict has arisen, we are aware, as to the rule laid down above, but the growing civilization of the states tends to close technical gaps for escape to the guilty and open meritorious ones for the innocent.[1]

§ **93. Extradition.**— The law of the United States upon this subject will be found in sections 5270 to 5280 of the Revised Statutes. As there are no courts for settling strifes among nations, the right to the surrender of fugitives from the justice of one country to the justice of another rests on treaties between this government and foreign powers. Aside from treaties the authorities seem to hold that fugitives from the justice of one country cannot be surrendered by the country to which they have escaped.[2]

[1] Taylor v. Taintor, 16 Wall. 366; State v. Horn, 70 Mo. 466. See Sizemore v. State, 3 Head, 26. In Coleman v. Tennessee, 97 U. S. 309, it was held that a prior conviction of a federal soldier of murder by a United States military court in Tennessee, with a sentence that he should be hung, which sentence was never executed, divested the state court of jurisdiction.

[2] Notes on Revised Statutes of U. S. ch. 66: "International extradition of fugitives is a matter of comity, and, apart from treaty stipulations, it is the settled policy of this country not to make such extradition. 6 A. G. Op. 85, 431; 2 id. 559; 3 id. 66; 2 id. 452, 559; 1 id. 509; Holmes' Case, 14 Pet. 593; United States v. Watts, 8 Sawyer, 370; Re Metzger, 5 How. 176; United States v. Davis, 2 Sumner, 482; Re Dos Santos, 2 Brock. 493; Re British Prisoners, 1 Wood. & M. 66; Adriance v. Lagrave, 59 N. Y. 110; Re Washburn, 4 Johns. Ch. 105; 1 Kent, Com. 36; Com. v. Hawes, 13 Bush, 697; United States v. Rauscher, 119 U. S. 407; Benson v. McMahon, 127 U. S. 457. It is not the right of individuals, but only of the foreign government. Re Ferrelle, 28 F. R. 878; 24 Blatch. 155. The several states have no means of negotiation with foreign nations, and cannot exercise the power of international extradition. Holmes v. Jennison, 14 Pet. 540; Ex parte Holmes, 12 Vt. 631; 3 A. G. Op. 59; Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; Re Metzger, 5 How. 176; Ex parte Morgan, 20 F. R. 298; People v. Curtis, 50 N. Y. 321. As to who is a fugitive from justice, see Roberts v. Reilly, 116 U. S. 80; Ex parte Reggel, 114 U. S. 642; Ex parte Brown, 28 F. R. 653; Re Roberts, 24 id. 132; State v. Richter, 37 Minn. 436; Jones v. Leonard, 50 Iowa, 106; Kingsbury's Case, 106 Mass. 223. Legislation in restraint of liberty, especially when summary, is strictly construed. Ex parte Morgan, 20 F. R. 298." United States v. Tobacco Factory, 1 Dillon, 266; Ropes v. Clinch, 8 Blatch. 304; The Clinton Bridge, 1 Woolw. 150; Taylor v. Morton, 2 Curtis, 454; Re Vandervelpen, 14

The entire matter of intercourse between this country and foreign countries in relation to the surrender of fugitives from justice is delegated to congress by the constitution to be regulated by statute and treaty.[1] The courts in interpreting those statutes give them a strict construction, and the crimes for which fugitives may be surrendered, when named in the statutes, will be construed under the definition given them by the law of the country to which the fugitive has escaped.

When a requisition is issued, the fugitive is arrested and brought before a tribunal of the country on which the demand is made, and there a preliminary hearing is had for the purpose of ascertaining whether there is probable cause for his surrender; and on showing the identity of the fugitive and proof connecting him with the commission of the offense, he is then surrendered to the custody of the nation demanding him.[2]

Blatch. 137; Fisher v. Harnden, 1 Paine, 55. As to forcible abductions, see Ker v. Illinois, 119 U. S. 436; Ex parte Brown, 28 F. R. 653.

[1] See above.

[2] Gould & Tucker's Notes on Revised Statutes of United States, sec. 5271: "The words 'similar purposes' in section 5 of Statutes 1882 mean proof of criminality, and whether the original or a copy is offered it is inadmissible unless receivable in proof of criminality. Re McPhun, 24 Blatch. 254; 30 F. R. 57; Re Herres, 33 id. 165. That section restores, in substance, the provisions of 12th Statute, 84. Re Behrendt, 23 Blatch. 40; 22 F. R. 699. Under Revised Statutes, section 5596, section 5271 was in force in lieu of section 2 of Statutes 1848, and not in lieu of the act of 1860. Re Stupp, 12 Blatch. 501, 523; Re Ross, 2 Bond, 252. The United States diplomatic officer's certificate, if in proper form, is absolute proof. Id.; Re Fowler, 18 Blatch. 430; 4 F. R. 303; Ex parte Lane, 6 id. 34. And oral proof will also serve to authenticate the documents or depositions. Id.; Re Wadge, 21 Blatch. 300; 15 F. R. 864; 16 id. 382. So any depositions or other documentary evidence, or copies of them, are competent if so authenticated as to show that the tribunals of the country where the offense was committed would receive them in support of the same criminal charge. Id.; Re Henrich, 5 Blatch. 414; Re Farez, 7 id. 345; Re Kelley, 25 F. R. 268; Re Charleston, 34 id. 531. The proof of proper authentication may be given orally by an expert. Re Benson, 34 F. R. 649. See 6 A. G. Op. 270; 8 id. 420; 10 id. 501. If a United States treaty conflicts with a state law the latter is void. Ware v. Hylton, 3 Dall. 199; Owings v. Norwood, 5 Cranch, 344; Fairfax v. Hunter, 7 id. 603; Hopkirk v. Bell, 3 id. 453, 457; Worcester v. Georgia, 6 Pet. 515; Pollard v. Kibbe, 14 id. 412; Fisher v. Harnden, 1 Paine, 55; Gordon v. Holiday, 1 Wash. 291. If it conflicts with an act of congress, the latter is void if it antedates the treaty, but valid if later in time. The Cherokee Tobacco Case, 11 Wall. 616; United States v. The Peggy, 1 Cranch, 103."

The agent of the foreign government who has had the fugitive delivered to him cannot, if he permits the fugitive to escape, pursue and recapture him in such government; he can only be arrested by the officers of the government where he is. The agent is not an officer of the United States, within the meaning of the statute denying the power of the state courts to issue writs of *habeas corpus* to United States officers.[1] The federal courts have concurrent jurisdiction over persons who are arrested on extradition process.[2]

It is the duty of the state court to determine in some legal mode whether the prisoner is a fugitive from justice or not when he is demanded, and the governor of the state holding the prisoner must decide on that; but this probably may be reviewed. The prisoner may have left either before or after indictment was found or the charge of crime was made.[3]

The warrant of the governor must be accompanied with a copy of the indictment found or affidavit alleging the charge with sufficient explicitness to justify the magistrate in commit-

[1] The agent provided for by this section is not an officer of the United States within the meaning of former decisions of the supreme court denying the power of state courts to issue writs of *habeas corpus* to United States officers for the discharge of prisoners held by them. Robb v. Connolly, 111 U. S. 624.

[2] Federal and state courts have concurrent jurisdiction over persons who are arrested on extradition process. Robb v. Connolly, 111 U. S. 624; Ex parte Brown, 28 F. R. 653.

[3] The statute does not prescribe the character of the proof which must be adduced to show that the person demanded is a fugitive from justice, but such proof must be made before a writ can issue. The executive of the state or territory in which the accused is found must determine, in some legal mode, whether he is a fugitive from the justice of the demanding state. Ex parte Reggel, 114 U. S. 642. Whether the person demanded is a fugitive from justice or not is a question of fact which the governor upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are unsettled questions. Roberts v. Reilly, 116 U. S. 80. To be a fugitive from justice it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply having been within a state where he has committed that which by its laws constitutes a crime, when he is or ought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another. Id.; Ex parte Brown, 28 F. R. 653.

ting the accused.[1] The words of the statute, "treason, felony or other crime," include misdemeanors, and state or federal courts may, on *habeas corpus*, determine the sufficiency of the warrant or lawfulness of the imprisonment.[2]

[1] Unless a copy of the indictment or an affidavit accompanies the warrant, the latter is void, and the governor upon whom demand is made has no jurisdiction to act. Re Doo Woon, 18 F. R. 898; Ex parte Morgan, 20 id. 298. The affidavit must be so explicit and certain that if it were laid before a magistrate it would justify him in committing the accused to answer the charge. Ex parte Morgan, *supra*. Unless the affidavit alleges that the crime was committed in the state which demands the return of the accused, the governor upon whom demand is made is without jurisdiction. Ex parte Smith, 3 McLean, 121, 133. It must also be alleged that the accused committed the crime. An allegation based on suspicions is not good. This is constitutional, congress having power to make all needful rules and regulations in respect to the territories, and implied power to enact an extradition law between them, or between any of them and the states. Prigg v. Com. 16 Pet. 539; Re Roberts, 24 F. R. 132; Re Mahon, 34 id. 525; Ex parte Morgan, 20 id. 298; Ex parte Smith, 3 McLean, 121; Re Romaine, 23 Cal. 585; Roberts v. Reilly, 116 U. S. 94; Kentucky v. Dennison, 24 How. 104; Re Titus, 8 Ben. 411; Ex parte Ammons, 34 Ohio St. 518; Re Briscoe, 51 How. Pr. 422; Re Voorhees, 32 N. J. L. 141. *Contra*, State v. Loper, Ga. Dec. Pt. 2, 33. But the executive is not authorized to make a demand unless the party is charged in the regular course of judicial proceedings. Kentucky v. Dennison, 24 How. 66, 104; State v. Hufford, 28 Iowa, 391; Ex parte White, 49 Cal. 433. And there can be no demand before complaint.

[2] Gould & Tucker's Notes on the R. S. of U. S. p. 988: "The words 'treason, felony or other crime' (in sec. 5278, R. S. of U. S., and in U. S. Const. sec. 2, art. 4) embrace every act forbidden or made punishable by the laws of the demanding state, including misdemeanors. Ex parte Reggel, 114 U. S. 642; Kentucky v. Dennison, 24 How. 66, 99; Morton v. Skinner, 48 Ind. 123; Re Leary, 10 Ben. 197; State v. Jackson, 36 F. R. 258; Brown's Case, 112 Mass. 409; State v. Stewart, 60 Wis. 587; Re Hooper, 52 id. 699; People v. Brady, 56 N. Y. 182; People v. Donohue, 84 id. 438; 18 Am. L. Rev. 181. See Re Robb, 19 F. R. 26. The state and federal courts have concurrent jurisdiction, under this provision, to determine, by writ of *habeas corpus*, the lawfulness of the arrest and imprisonment. Id.; Robb v. Connolly, 111 U. S. 624; Re Doo Woon, 18 F. R. 898; Ex parte Brown, 28 F. R. 653; Re Roberts, 24 id. 132; Re Mohr, 73 Ala. 503; Malcomson v. Gibbons, 56 Mich. 459; Work v. Corrington, 34 Ohio St. 64. The Cherokee nation is a part of the Indian country, and not a state or territory within the act. Ex parte Morgan, 20 F. R. 298. But the District of Columbia is within the meaning of the act. Re Buell, 3 Dillon, 116. The person authorized by the executive of the demanding state to demand the extradition and surrender of the fugitive is not, *pro hac vice*, a United States agent or officer, but merely the agent of the demanding state. Robb v. Connolly, 111 U. S. 624; Robb's Case, 9 Sawyer,

§ 94. Extradition as between states.— In order to give the reader a clearer view of what I shall say touching the extradition of fugitives escaping from the justice of one state to another, I copy section 5278, United States Revised Statutes: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear," etc. Under this statute several courts have put a construction on the words "from which the person so charged has fled," and have held that they require proof of an actual fleeing or leaving the state where the crime was committed; that hence if the alleged fugitive was never in the state where demanded he cannot be surrendered but may be discharged on *habeas corpus*.[1] The force and con-

568; Re Titus, 8 Ben. 411; Re Mohr, 73 Ala. 503; Pettus v. State, 42 Ga. 358. The prisoner may be arrested and tried for another offense before he has an opportunity of returning to the state whence he was brought, if there is no compact between the states that this shall not occur. State v. Stewart, 60 Wis. 587."

[1] The complaint should set forth briefly and clearly the substance of the offense charged, and the substantial, material features thereof. Re Henrich, 5 Blatch. 414; Re Van Hoven, 4 Dillon, 411, 415; Re Macdonnell, 11 Blatch. 79; Ex parte Hibbs, 26 F. R. 421; State v. Stundahl, 34 Minn. 115. It is sufficient if it describes the offense in general terms only, such as are used in the statute or treaty. Castro v. De Uriarte, 16 F. R. 93; Re Roth, 15 id. 506. It is fatally defective if it does not show upon its face that the person making it was an agent or representative of a foreign government (Re Harris, 32 F. R. 583), or that the commissioner issuing the warrant was duly empowered so to do. Ex parte Lane, 6 F. R. 34; Re Kelley, 25 id. 268. The offense is properly charged if made by the officer officially, without averring his personal knowledge of the facts. Re Farez, 7 Blatch. 345; Re Jackson, 2 Flippin, 183; Re Kelly, 26 F. R. 852. Upon a complaint

struction of the words were not considered when the statute was drawn, but it will probably be so amended as to meet the wants of justice. It is undoubtedly the duty of one state to deliver a fugitive from justice to another state, on the proper demand of the executive authority upon the governor of the state where such fugitive has fled, but such duty is an administrative one and cannot be enforced by the courts.[1] When

by a private individual, his authority to act for the foreign executive must appear. Re Ferrelle, 24 Blatch. 155; S. C. 28 F. R. 878. Upon a complaint under oath, the judge is to examine only the evidence of criminality, without regard to the authorization of the application by a foreign government (Re Dugau, 2 Lowell, 367; Ex parte Van Aernam, 3 Blatch. 160), and without previous application made to the president. Re Kelley, 2 Lowell, 339; Ex parte Kaine, 3 Blatch. 1; Castro v. De Uriarte, 16 F. R. 93; Re Ross, 2 Bond, 252.

[1] A warrant issued by the governor of the state on which the demand is made is *prima facie* evidence that all necessary legal prerequisites have been complied with. Davis' Case, 122 Mass. 324; Kelly v. State, 13 Tex. App. 158; Ex parte Sheldon, 34 Ohio St. 319. And the recitals in the warrant of the governor of the demanding state are conclusive that the accused stands charged with crime in that state. Leary's Case, 6 Abb. N. Cas. 43; Ex parte Swearingen, 13 S. C. 74; People v. Pinkerton, 17 Hun, 199; Hibler v. State, 43 Texas, 197; Johnston v. Riley, 13 Ga. 97. See Hartman v. Aveline, 63 Ind. 344; 30 Am. Rep. 217. Such governor may revoke his warrant. Work v. Corrington, 34 Ohio St. 64. And parol evidence is admissible that accused was not actually present in the state demanding. Wilcox v. Nolze, 34 Ohio St. 520. The warrant is sufficient if its face shows every fact requisite to the jurisdiction of the officer; that such jurisdiction has been regularly and formally invoked for the arrest of the alleged fugitive; and declares in terms the special authority upon which the proceedings are based to be the treaty, the act of congress, and the appointment of the officer to execute the law, the demand of the foreign government, the mandate of this, and the offense charged. It is not necessary that the particulars required to be proved, in order to establish the offense mentioned in the treaty, should be specified in the warrant; nor is it any part of its province to disclose the details, in order that the prisoner may be informed thereof. Re Macdonnell, 11 Blatch. 79. A warrant is good if it describes the crime in the words used in the statute or treaty. Castro v. De Uriarte, 16 F. R. 93. Under the treaty of Great Britain of 1842, and the statute of 1848, the warrant must have the commissioner's authority to issue it. Re Kelley, 25 F. R. 268. Hence, a complaint for forgery, which does not specify the kind of document forged, or its character, is defective. Ex parte Van Hoven, 4 Dillon, 411. If the indictment against the fugitive is framed in substantial accord with the rules of the state which makes the demand for his return, the executive on whom demand is made cannot deny a requisition because it is not drawn according to the technical rules of criminal pleading. Ex parte Reggel,

the demand is made, the duty of the state to surrender is not an absolute one, for the fugitive may be wanted in such state because he has offended against its own laws, or proceedings

114 U. S. 642. The sufficiency of the indictment is to be determined by the courts of the state which makes the demand; not by the executive upon whom it is made. Kentucky v. Dennison, 24 How. 66, 107. It is a question of law whether the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled; and this question is always open upon the face of the papers to judicial inquiry, on an application for discharge under a writ of *habeas corpus*. In Jones & Atkinson v. Leonard, 50 Iowa, 108, it is said: "By issuing the warrant for the arrest of the plaintiffs it may be said the governor has determined this question. But this does not conclude all inquiry by the courts as to the sufficiency of the evidence upon which his conclusion was based. It may be conceded that the affidavit was *prima facie* sufficient, or, rather, it was the province of the governor to so determine. . . . Conceding, however, that the determination of the governor is conclusive as to the sufficiency of the affidavit, we have for determination the question whether the plaintiffs are in fact fugitives from justice. Bouvier defines such person to be 'one who, having committed a crime in one jurisdiction, goes into another in order to evade the law and avoid punishment;' and the constitution of the United States defines such person to be one 'who shall flee from justice.' It is difficult to see how one can flee who stands still. That there must be an actual fleeing we think is clearly recognized by the constitution of the United States. The words 'who shall flee' do not include a person who never was in the country from which he is said to have fled." The People v. Adams, 3 Denio, 190; In the Matter of Manchester, 5 Cal. 237; Ex parte Smith, 3 McLean, 121. Taylor v. Taintor, 16 Wall. 370: In such cases the governor acts in his official character, and represents the sovereignty of the state in giving efficacy to the constitution of the United States and the law of congress. If he refuses there is no means of compulsion. Wisconsin v. Pelican Ins. Co. 127 U. S. 288: This court has declined to take jurisdiction of suits between states to compel the performance of obligations which, if the states had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in Kentucky v. Dennison, 24 How. 66, where the state of Kentucky, by her governor, applied to this court in the exercise of its original jurisdiction for a writ of *mandamus* to the governor of Ohio to compel him to surrender a fugitive from justice, this court, while holding that the case was a controversy between two states, decided that it had no authority to grant the writ. Ex parte Virginia, 100 U. S. 348; Ex parte Clarke, 100 U. S. 409; Ex parte Reggel, 114 U. S. 650, holding as follows: "It is objected in the court of original jurisdiction that there could be no valid requisition based upon an indictment for an offense less than a felony. This view is erroneous. It was declared in Kentucky v. Dennison, 24 How. 66–99, that the words 'treason, felony or other crimes' in section 2 of article 1

may be pending against him; if so, the state where he is has a primary right to hold him.[1]

If crime is clearly charged against the fugitive, formal defects should be disregarded, and it is not material whether the act done is indictable or punishable in the state to which the fugitive has fled, if it was a violation of the law of the demanding state.[2]

The question of the fugitive's guilt or innocence is immaterial; for that will be ascertained by the forum that tries him.[3] The executive has nothing to do with that. If the fugitive has been delivered over to the agent of the state demanding him by the executive of the state to which he had fled, the warrant may be revoked at any time before the fugitive has been removed from the state, if believed to have been improvidently issued, and the fugitive be discharged from arrest. In some of the states by statute, and in some by comity, a fugitive from justice may be arrested in the state to which he has fled, and there held for a reasonable time to await the receipt of a requisition from the executive of the state whose laws he has offended.[4] If a demand is not made in a reasonable time he will be discharged from custody. He cannot be delivered up without the proper requisition from the executive of the state whence the demand should be made.[5]

In some states the grand jury is abolished and indictments are not found. In such case the information or charge by the proper prosecuting officer stands in place of an indictment, and any court or officer having power to bind over and hold the prisoner for trial stands in place of a magistrate.[6] The warrant of the executive of the state where the fugitive has fled is *prima facie* evidence that all necessary prerequisites have been

of the constitution include every offense, from the highest to the lowest, known to the law of the state from which the accused has fled, including misdemeanors."

[1] Robb v. Connolly, 111 U. S. 624; Roberts v. Reilly, 116 U. S. 95.

[2] Work v. Corrington, 84 O. St. 64; Davis' Case, 122 Mass. 328; Brown's Case, 112 Mass. 409; People v. Donohoe, 84 N. Y. 44[illegible]: Johnston v. Riley, 13 Ga. 130; Morton v. Skinner, 48 Ind. 123.

[3] People v. Bendy, 56 N. Y. 186; Work v. Corrington, 33 Am. Rep. 350; S. C. 34 Ohio St. 64.

[4] In re Fetter, 23 N. J. L. 311; Ex parte Rosenblat, 51 Cal. 287; Ex parte White, 49 Cal. 433; Ex parte Cubreth, id. 435. See note 5, pp. 242, 243, 244.

[5] See above; also n. 2, p. 212.

[6] See 1 Law. Rep. Ann'd, 370, full discussion and cases.

complied with, and if the demand of the executive and the affidavit from the demanding state is regular the warrant is conclusive evidence of the right to surrender.[1] All technical questions of pleading should be determined in the trial court after the fugitive is surrendered; they cannot be determined on *habeas corpus*.[2] If a person does an act that culminates in a crime as a direct consequence and withdraws himself from the state, without waiting to know the consequences of his act, he is a fugitive from the justice of the state where the act was done.[3] But the above rule does not cover constructive presence in the demanding state, and a constructive flight therefrom, but relates only to the actual presence of the fugitive it desires to have surrendered; hence, under the construction of the interstate act of extradition, the fugitive may be guilty of the most heinous crime as principal or accessory before the fact, and not subject to extradition, as before stated.[4]

We should mention, however, that where a person is extradited to a state, he cannot be put on trial for any other offense he may have committed in the state to which he was extradited.[5]

[1] If the proceedings are held in a state the laws of which give the accused in all criminal proceedings the right to testify, that right should be accorded him. Re Farez, 7 Blatch. 345. *Contra*, Re Dugau, 2 Lowell, 367. And if the local law gives the accused the right to examine witnesses in his own behalf, it is error to refuse him that right, under a treaty which provides that the person charged shall be delivered up on such evidence as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed. Re Kelley, 25 F. R. 268.

[2] Re Keller, 36 Fed. Rep. 681.

[3] See n. 2 above; also n. 5, p. 241.

[4] See n. 1, p. 238.

[5] State v. Hall, 28 Cent. Law J. 238; S. C. 40 Kan. 338: "A fugitive from justice can be obtained from another state or country only with the consent of the executive authorities of such other state or country; and for a state to procure a fugitive from justice from some other state or country, to be tried for some particular offense, by the consent of such other state or country, and then to try him for another and a different offense before he has had an opportunity to return, would be such an unwarranted abuse of judicial process, such a fraud upon justice, such an act of perfidy, that no court in any country should for a moment tolerate the same. The foregoing rule of law applies in criminal cases where the fugitive from justice has been extradited from a foreign country. United States v. Rauscher, 119 U. S. 407, 7 S. C. Rep. 234; United States v. Watts, 8 Sawy. 370, 14 Fed. Rep. 130; Ex parte Hibbs, 26 Fed. Rep. 421, 431; Ex parte Coy, 32 Fed. Rep. 911, and note; Com. v.

§ 95. Concurrent remedies.— When jurisdiction is given to a court over offenses of a particular class, and afterwards the legislature confers jurisdiction upon another court over the the same class of actions, their jurisdiction is concurrent. If,

Hawes, 13 Bush, 697; State v. Vanderpool, 39 Ohio St. 273; Blandford v. State, 10 Tex. App. 627. In the cases above cited the fugitives from justice were extradited under treaties, but in these treaties there was no provision that the fugitive from justice should be tried only for the offense for which he was extradited. Hence the foregoing decisions are perfectly applicable to this case. The foregoing rule of law also applies in criminal cases between states (State v. Simmons, 39 Kan. 262; In re Cannon, 47 Mich. 481, 11 N. W. Rep. 280); and it applies as strongly between states as it does between foreign countries. In Lagrave's Case, 14 Abb. Pr. (N. S.) 344, 346, Judge Daniels uses the following language: 'In principle, there can be no practical difference between the case of a fugitive brought from a neighboring state under the constitution and laws of the United States and one brought from a foreign country under the provisions of its treaties. In each the right of freedom to return is precisely the same, and the implied guaranty of that right under the laws is no greater in one case than it is in the other.'" Under these provisions, which have reference to all treaties made by the United States, the person accused is not now to be delivered up to be tried for any other offense than that charged in the extradition proceedings. United States v. Rauscher, 119 U. S. 423; Ker v. Illinois, id. 436; Com. v. Hawes, 13 Bush, 697; Blandford v. State, 10 Tex. App. 627; State v. Vanderpool, 39 Ohio St. 273; United States v. Watts, 8 Sawy. 370, 14 Fed. Rep. 130; Ex parte Hibbs, 11 Sawy. 452, 26 Fed. Rep. 421; Adriance v. Lagrave, 59 N. Y. 110; United States v. Caldwell, 8 Blatch. 131; United States v. Lawrence, 13 id. 295; 15 A. G. Op. 504; Re Miller, 23 Fed. Rep. 32; Re Kelly, 26 id. 852; Re Noyes, 17 Alb. L. J. 407; People v. Gray, 5 Pac. Rep. 240; Ex parte Coy, 32 Fed. Rep. 911; Ex parte Ker, 18 Fed. Rep. 167. In this respect the comity between foreign nation appears to be exercised less liberally than between the several states. Id.; Haraland v. Territory, 13 Pac. Rep. 453; State v. Stewart, 60 Wis. 587; Re Cannon, 47 Mich. 481; Re Miles, 52 Vt. 609; Ham v. State, 4 Tex. App. 645; Dow's Case, 18 Pa. St. 37; Williams v. Bacon, 10 Wend. 636; Browning v. Abrams, 51 How. Pr. 172; Re Noyes, 17 Alb. L. J. 407. A person extradited from a foreign nation cannot be put on trial for another crime until after the lapse of a reasonable time after the expiration of his sentence. State v. Vanderpool, 39 Ohio St. 273. A surrendered fugitive cannot in the tribunals of his own country question the good faith of the extradition proceedings. Re Miller, 23 Fed. Rep. 32; Re Reintiz, 39 Fed. Rep. 204. See 28 Cent. Law Jour. 241, n.; State v. Hall, 40 Kan. 338. Work v. Corrington, 34 Ohio St. 64; S. C. 32 Am. Rep. 348 (Okey, J.): "We agree, with counsel for the plaintiff in error, that the question in this case is of general, and not merely local, importance. It involves the power of a governor to revoke a warrant of extradition of a fugitive from justice, issued on the requisition of a governor of another state. We are not aware that the question has been presented in the courts of the United

however, the language of the statute is such as to give the latter court exclusive jurisdiction, it will impliedly take the jurisdiction away from the court first vested with it; but re-

States or in the court of last resort of any state. That it is not free from difficulty is conceded. In an opinion of the chief executive of Maine (Governor Fairchild), 6 Am. Jur. 223, he said: 'There is no question in my mind as to the power to recall the warrant which has been issued in this case.' In the Matter of Adams, 7 Law Reporter, 386, it appears that Governor Thomas W. Bartley revoked the warrant which he had issued for one charged with obtaining money by false pretenses. On July 6, 1857, Governor Salmon P. Chase revoked a warrant he had issued on the requisition of the governor of Illinois; and this was done, it appears, after full argument by learned counsel. In one case Governor John Brough stated on the record, as a reason for the revocation, that 'soon after the issuing of the warrant, information was received that this requisition had been obtained for an ulterior object.' In another case, Governor J. J. Cox, in revoking a warrant, says it was done 'on affidavits showing that the complainant in the case is unworthy of belief, and that the affidavits on which the requisition was issued were made under an assumed name.'" The supreme court of California, in Ex parte Cubreth, 49 Cal. 435, held that the law "authorizing the arrest of a fugitive from justice who has fled from another state, before a demand for his surrender from the state from which he has fled, and his detention for a reasonable time to afford an opportunity for such executive demand, is not in conflict with the second section of article 4 of the constitution of the United States." The chief justice, in stating the opinion of the court, said: "That while the provision of the constitution referred to required that the fugitive should be surrendered upon the demand of the executive of the state in which the crime is charged to have been committed, it did not otherwise, or in the absence of the executive demand, undertake to define the duties or limit the authority of the state within which the fugitive from justice might be found. The constitution of the United States does not assume to deal with the question before the proper executive demand shall have been made, while, upon the other hand, the statute provides for the detention of the fugitive for a reasonable length of time in advance of, and to afford an opportunity for, the executive demand upon which the surrender is to be made. . . . The paramount constitutional duty of the state to make the surrender upon proper executive demand was in no wise in conflict with its reserved power to deal with the fugitive in the absence of such demand." See Ex parte Rosenblat, 51 Cal. 285. In the Matter of Romaine, 23 Cal. 591, the court remarked: "The clause (in the constitution) applies only to criminals fleeing from one 'state' to another 'state,' and does not in express terms apply to those fleeing from a territory to a state, which is the case now under consideration. This case is not directly provided for by the national constitution, and we are therefore compelled to look elsewhere for the power to return the parties before us." These parties had been arrested upon a warrant issued by the governor of California upon a requisition made by the acting gov-

peals by implication are not favored.[1] Where two courts have concurrent jurisdiction over the same class of offenses, in the same case, the one first acquiring jurisdiction has a right to try the action; and a plea in abatement filed in the court last acquiring it, to the effect that the first court took and acquired jurisdiction and the action is there pending for the same offense, is a good plea, for the first court should then try the action.[2]

ernor of the territory of Idaho, and the court held the proceeding to be legal under the laws of the state. In Robinson v. Flanders, 29 Ind. 10, it was held that the state law requiring the officer to take the party before the nearest judge for identification is valid. In Ex parte Joseph Smith, 3 McLean, 121, it was held that a state law which makes it the duty of an executive to issue the warrant upon a proper requisition is constitutional. See Bump's Notes of Constitutional Decisions, p. 297.

[1] See note 1, p. 246.

[2] Taylor v. Taintor, 16 Wall. 367; State v. Hun, 70 Me. 466; Coleman v. Tennessee, 97 U. S. 509. United States v. McBratney, 104 U. S. 621: "The circuit courts of the United States have jurisdiction of the crime of murder committed in any place or district of country under the exclusive jurisdiction of the United States; and, except where special provision is made, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. . . . The Cherokee Tobacco Case, 11 Wall. 616. Whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. The Kansas Indians, 5 Wall. 737; United States v. Ward, 1 Woolw. 17. The state of Colorado, by its admission into the Union by congress upon an equal footing with the original states in all respects whatever, without any such exception as has been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as to be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. But that treaty contains no stipulation for the punishment of offenses committed by white men against white men. It follows that the circuit court of the United States for the district of Colorado has no jurisdiction of this indictment, but, according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the state of Colorado to be dealt with according to law." Whart. Cr. Pl. & Pr. secs. 441, 442, 453; United States v. Amy, 14 Md. 152, n.; United States v. Cashiel, 1 Hughes, 552; Commonwealth v. Tenney, 97 Mass. 50; Jett v. Commonwealth, 18

Where a statute gives a new remedy where at common law but one existed, it is usually regarded as cumulative; if it gives the same remedy, it is affirmative; if it modifies, denies or withholds the remedy, the common law is repealed; or, rather, the common-law right is merged in the remedy given by the statute.[1]

Gratt. 953. "Conviction and punishment of an accused in one sovereignty is no bar to his conviction and punishment in another in which the offense was originally committed." McAllister, J., Phillips v. People, 55 Ill. 433, citing State v. Brown, 1 Hayw. 116; United States v. Amy, *supra;* Commonwealth v. Andrews, 2 Mass. 14; Commonwealth v. Green, 17 Mass. 540–7. See Whart. Cr. Pl. & Pr., *supra.* In Marshall v. State, 6 Neb. 120, it was intimated that when the penalty inflicted was in full satisfaction for the whole offense the second prosecution might be barred. Gumbel v. Pitkin, 124 U. S. 144: "In the subsequent case of Covell v. Hyman, 111 U. S. 176, it was decided that the principle that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being, applies both to a taking by a writ of attachment under a mesne process and to a taking under a writ of execution. It was there also decided that property thus levied upon by attachment or taken in execution is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him. Page 184." See Lammon v. Feuzier, 111 U. S. 17; Withers v. Denmead, 22 Md. 143; Mapes v. People, 69 Ill. 527; Ex parte Robinson, 6 McLean, 362; Buck v. Colbath, 3 Wall. 344–5; Denny v. Bennett, 128 U. S. 489; Tua v. Carriere, 117 U. S. 208.

[1] United States v. Tynen, 11 Wall. 92: "But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. Daviess v. Fairbairn, 3 How. 636; Bartlet v. King, 12 Mass. 537; Commonwealth v. Cooley, 10 Pick. 37; Pierpont v. Crouch, 10 Cal. 315; Norris v. Crocker, 13 How. 429." State v. Virt, 3 Ind. 447; State v. Worden, 46 Conn. 362; Ex parte Birchfield, 52 Ala. 378. State v. Norton et al. 23 N. J. L. 40: "When the common law and a statute differ, the common law gives place to the statute only where the latter is couched in negative terms or where its matter is so clearly repugnant that it necessarily implies a negative. 1 Black. Com. 89. It is a rule of exposition that statutes are to be construed in reference to the princi-

An amendment of a statute reducing the offense or the punishment under it is treated as a repeal of the former statute.[1] Where the United States punishes an act as a crime and the same act is criminal by the statute of a state, and the jurisdiction of the United States is not exclusive, then a court of each may try the offender; but usually the second conviction is barred by the first, where the crime is the same and jurisdiction concurrent; but if the character and nature of the crime are not the same, then the court will not consider in the second case the former conviction and punishment. These cases depend on their facts. The offenses, being against two sovereignties, the trial of the case in one is not in law a bar to the trial in the other.[2]

§ 96. General remarks.— The subject of criminal jurisdiction is an interesting one to the student. Each sovereignty is independent of all others in governing its subjects and property. The high seas are the common roadway of the nations, and each nation may protect itself thereon. Each sovereignty must have the right to punish its own citizens the same as a parent corrects its child for acts done that are forbidden on the premises of the parent or those of the neighbor. There are no courts having jurisdiction of the nations in mass; civilization has not thus far progressed. Until the time comes when courts shall determine international law, and decide international controversies, not by high commissions, that are only international arbitrations or rest on international proctorial power, each nation will determine for itself what punishment shall be imposed on persons who violate its laws abroad, without reference to the bounds of the national domain. The crime is as grave if done in a foreign land as if done in the capital of the nation.

The offense being against the nation and its laws, and the property of its citizens, it is proper it should be punished by

ples of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced, for if the parliament had had that design it is naturally said they would have expressed it."

[1] People v. Tisdale, 57 Cal. 104.

[2] See note 2, p. 245.

the government whose laws are transgressed. The only question is whether the offense is a national one. If piracy, it is against all nations; if treason, of a nature that tends to destroy the government, the offense is identified easily. So, also, all offenses against lives or property. Venue is arbitrary in any court, and arose from mercy to the accused in giving him a trial in the locality of the offense; and if the accused has put it out of the power of the state to try him there, that should not place him beyond the reach of justice.[1]

It might be proper to remark that the constitution of the United States expressly provides (art. 1, § 8) that congress shall have the power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to suppress insurrections and repel invasions, punish counterfeiting of securities and current coin of the United States. The only limit as to the place for the trial of criminals is that it shall be in the state where the crime was committed; but when not committed in the United States, the trial shall be had at such place or places as congress shall designate or may direct.[2] The ample power of congress on this subject, under the constitution, leaves no opportunity for the criminal to escape from the consequences of guilt, irrespective of the place chosen by him as a scene of crime. We may further say the crime is committed where the criminal act was consummated, and not where it was planned or put in motion.[3]

[1] See *ante*, § 87, note 2, p. 227.

[2] It is a fundamental principle of international law that each state is primarily authorized to punish offenses against itself. Of course, it cannot invade the territory or the ships of another country in order to arrest the offender. See this discussed in the Kozta Case, and Trent Case, in Woolsey, § 81; Whart. Com. Am. Law, §§ 139, 146, 239. But the arrest may be made wherever the offender is found in the territory of the offended sovereign. 4 Wendell's Blackstone, p. 305; R. v. Azzopardi, 1 C. & K. 203; R. v. Anderson, 11 Cox, C. C. 198; L. R. 1 C. C. 161.

[3] Whart. on Cr. Ev. §§ 324-335. See, also, 3 Whart. & St. Med. Jur. §§ 776 *et seq.* This definition of *corpus delicti* has been contested, it being assumed that *corpus delicti* means the dead body of the deceased. But the true meaning of the words is not "body of the deceased," but "body of the crime," and this involves the essential features of the crime as bearing on the issue. Any other meaning of the term would render nugatory the limitations that the burden of the *corpus delicti* is on the prosecution, and that accomplices are to be corroborated as to the *corpus delicti*. As adopting the definition of the text, see State v. Dickson, 78 Mo. 438; Lutton v. State, 14

§ 97. The power to render a judgment in a criminal case is limited to a constitutional trial.— The constitution of the United States provides for a public trial by a jury of the state or district wherein the crime shall have been committed, which district shall have been previously ascertained or established by law, and that the accused shall be informed of the nature and cause of the accusation against him, confronted by the witnesses against him, have compulsory process for obtaining his witnesses and the assistance of counsel. It further provides that no person shall be subject for the same offense to be put twice in jeopardy of life or limb; nor be compelled to give evidence against himself. Each state constitution has similar provisions, and, if not, the United States constitution would be binding on the courts, and a trial by a different method than that prescribed by it would be a nullity and the judgment void.[1]

Texas App. 518; State v. Stowell, 60 Iowa, 535; Whart. Crim. Ev. §§ 324, 325, 633.

[1] Hans Nielsen, Petitioner, 131 U. S. 182: "But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional or for any other reason, the judgment is void and may be questioned collaterally; and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the cases of Ex parte Lange, 18 Wall. 163, and Ex parte Siebold, 100 U. S. 371, and in several other cases referred to therein. In the case of In re Snow, 120 U. S. 274, we held that only one indictment and conviction of the crime of unlawful cohabitation, under the act of 1882, could be had for the time preceding the finding of the indictment, because the crime was a continuous one and but a single crime until prosecuted; that a second conviction and punishment of the same crime, for any part of said period, was an excess of authority on the part of the district court of Utah, and that a *habeas corpus* would lie for the discharge of the defendant imprisoned on such conviction. . . . It is true that in the case of Snow we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or anywhere else in the record (of which the judgment is only a part), it is sufficient. . . . It was laid down by this court in In re Coy, 127 U. S. 731, 758, that the power of congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of *habeas corpus* as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: 'And if their want of power appears on the face of the record of his condemnation, whether in the in-

The refusal of the court to grant each of the rights above enumerated, or all of them, seems to go to the jurisdiction; and if the court has jurisdiction to try the action, it seems to lose jurisdiction once acquired by a disobedience of the mandates of the constitution; or, rather, the trial ceases to be a legal trial by a deviation from this course. Therefore when any constitutional right or immunity of a person is violated, the judgment of the court is void. The supreme court of the United States, in a recent case, say: "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative

dictment or elsewhere, the court which has authority to issue the writ is bound to release him,' referring to Ex parte Siebold, 100 U. S. 371. In the present case, it is true, the ground for the *habeas corpus* was not the invalidity of an act of congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in Ex parte Lange, where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow; the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in Ex parte Siebold, 100 U. S. 371, 375, and is illustrated by the case of Ex parte Parks, as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow there was a denial or invasion of a constitutional right. . . . The law could hardly be stated with more categorical accuracy than it is in the opening sentence of Ex parte Wilson, 114 U. S. 417, 420, where Mr. Justice Gray, speaking for the court, said: 'It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.'"

of a person's constitutional rights than an unconstitutional conviction under a valid law." Under this rule if a court errs in assuming jurisdiction where it does not possess it, or in interpreting a constitutional immunity or right secured thereby against a prisoner, or in refusing him a constitutional right, the jurisdiction over him ceases and its acts are not simply erroneous, but void.[1] Therefore it may be laid down as a rule of law, that the error of a court in construing any constitutional immunity or right in a criminal case against the accused is as fatal to the judgment as assuming jurisdiction originally where the court had none. Error in either case destroys the power to render any valid judgment, and, if rendered, it is not simply erroneous, but void.[2]

The reader must discriminate between a simple erroneous construction of a statute, the erroneous admission of testimony, the erroneous instruction of a jury or the erroneous ruling on a demurrer, from the erroneous construction of a constitutional right and erroneous assumption of jurisdiction; the former being simply errors of law, the latter being jurisdictional. In the one case, the acts of the court are simply voidable; in the other, the error goes to the power of the court itself. When we come to discuss the jurisdiction in *habeas corpus* proceedings, in the next chapter, we shall deal more extensively with this question.

[1] See note, pp. 249, 250.

[2] See note, pp. 249, 250.

CHAPTER XI.

JURISDICTION IN HABEAS CORPUS.

Habeas corpus, definition of; use of the writ — Averments of petition; what inquired into — The legality of process inquired into — Constitutionality of process inquired into — Constitutional immunities inquired into — Power of the legislature inquired into — All excess of jurisdiction inquired into — Where court has no constitutional right to try, writ lies — Sentence exceeding jurisdiction gives writ — Once in jeopardy inquired into — Where demurrer confesses want of power — Misconstruction of statute mere error — Error in judgment immaterial — Want of power in court, good cause for — Error in sentence in excess of law — Writ may be issued where imprisonment is illegal . . . . . § 98

Jurisdiction of the United States courts — Writ of *habeas corpus* cannot be suspended, when — Grantable at common law — Supreme court takes appellate jurisdiction — Original jurisdiction of supreme court affects ambassadors, etc. — Appellate jurisdiction of supreme court over other federal courts — Writ of *certiorari* issues in aid of 99

United States district and circuit courts, jurisdiction of in *habeas corpus* — May issue writ where constitution of the United States is violated — Enlargement of jurisdiction 100

Want of constitutional trial — Writ issues when sentence exceeds jurisdiction — Writ issues when against constitution — Writ issues to relieve of unconstitutional law — Want of constitutional power to try — Refusal of jury trial gives writ — Restraint when term of court closed — Whatever goes to the jurisdiction gives writ 101

Constitutional immunities, effect of — Refusal of any gives writ — Defendant must have jury trial, and constitutional guaranties; confronted by, and have process for witnesses — Amending charging part of indictment gives writ 102

Void and voidable judgments — Error does not give writ — Want of jurisdiction over subject-matter gives writ — Want of power to render a particular judgment gives writ — Excess of statutory power and punishment gives writ — Court cannot sentence prisoner second time under same conviction — Defendant must have jury trial — Must be tried in the district — Denial of writ, effect of 103

Distinction between error and want of jurisdiction — Conviction where judgment void; effect of constitutional inhibition — Error must go to jurisdiction — Power of tribunal tried under writ . . 104

Voidable judgments do not give writ — Distinction between void and voidable judgments 105

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Writ of *certiorari* auxiliary to *habeas corpus* — *Certiorari* brings up the record — What will be inquired into under 113
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§ 98. Definition and nature of the writ.— *Habeas corpus* is a purely civil proceeding, commenced by or on behalf of the plaintiff, before a court or some judge thereof having jurisdiction, to enforce or test the right of the plaintiff to his personal liberty. The writ is issued on an application of the plaintiff or some one in his behalf, setting forth the facts concerning the detention of the party restrained of his liberty, in whose custody he is detained, and by virtue of what claim or authority, if known, he is restrained, and asking that the writ may issue and the plaintiff be restored to his liberty. The facts stated and set forth in the complaint must be verified.

The writ is issued commanding the defendant who has the plaintiff in custody to bring the body of the plaintiff before the court or a judge thereof with a return indorsed on the writ, or filed before the court, showing the day of the plaintiff's arrest and detention and the cause of the latter, in order that the court may determine why the plaintiff should not be given his liberty.[1] It will be readily seen that the

[1] Ex parte Tom Tong, 108 U. S. 559: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the pres-

question before the court is not to ascertain whether the plaintiff has committed a crime, but to inquire into and determine whether he is lawfully held in custody by the defendant who has charge of him. The legality of the process by

ent case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds, he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime." It is observed by Judge Blatchford in In re Stupp, 12 Blatch. 507, that "when the various sections of the Revised Statutes speak of denying the 'facts' set forth in the return, and of alleging any other material 'fact,' and of ascertaining the material 'facts,' and of determining the 'facts' of the case, they have no reference to the merits of the evidence which was put in before the commissioner, as tending to the conclusion of criminality. Where a person is held on process on final judgment, after conviction, on a trial on an indictment, and a *habeas corpus* is issued, the return to the writ states, as the cause of his detention, the process; and either on such return alone, or by the aid of a *certiorari*, the final judgment, the conviction, the fact of a trial and the indictment are brought before the court. These are the 'facts' of the case on the *habeas corpus*. The particulars of the evidence which led to the conviction are no part of such facts. In determining, on *habeas corpus*, the 'facts' of the case, the court does not determine what were the facts of the transaction which constituted the crime of which the party was convicted. It only determines whether there was an indictment, a trial, a conviction, a final judgment, a sentence, and process of execution and jurisdiction of such proceedings. It does not retry the case." See Ex parte Milligan, 4 Wall. 2; In re Farez, 7 Blatch. 34; In re Macdonnell, 11 id. 710; In re Stupp, id. 124; Ex parte Geissler, 4 Fed. Rep. 188; In re Doig, id. 198; Ex parte Curtis, 106 U. S. 371. The prevailing practice of the federal courts is much the same as that under the modern common law. In one of the United States circuit courts, as early as 1804, the court required a petition in writing, and a production of the warrant of commitment, or a copy, or an affidavit of refusal of the jailer to give a copy. Ex parte Bollman and Swartwout, 4 Cranch, 75. The petition should show in what the illegality of the imprisonment consists, and this should be done by stating the facts showing it. The prisoner should state in his petition for what offense he was arrested, if any, and a copy of the warrant of the committing magistrate should be set out in the petition. Chief Justice Hawley, of the supreme court of Nevada, held that even where a proper showing was otherwise made, it was questionable whether he would make a writ returnable before that court in the first instance, where it was sought to bring the petitioner from a distant

which he is held, the power of the court to issue the process, if any, and the right of the defendant to hold the plaintiff thereunder, all arise.[1]

If the plaintiff is charged with crime, this proceeding tests the jurisdiction of the court issuing the process; the constitutionality of the statute creating it; the process itself; the legality of the judgment or any right or immunity of the plaintiff under the constitution itself. Therefore the writ tests not only the legality or power of the court to issue process, but also the process, and the power of the legislature under the constitution to pass the act under which the prisoner was convicted, as well as any other right or immunity guarantied by the constitution and appearing by the record to have been denied him. Hence, if for any legal cause so appearing the court had no power to render the judgment it did render, the writ will lie.[2]

If, therefore, the defendant in a criminal proceeding was protected by a constitutional provision forbidding his being placed

county, without a showing of the absence, disability or refusal of the district judge of the county to act, or other good cause why it should be heard by the supreme court, or a justice thereof, and cited as authorities Ex parte Nye, 8 Kan. 99; Ex parte Ellis, 11 Cal. 223. Ex parte Deny, 10 Nev. 212. See also People v. Burtnett, 13 Abb. Pr. 8; S. C. 5 Park. Cr. 113, where it said that if petitioner makes application in an adjoining county, he must explicitly show that there is no officer in his own county authorized to grant the writ. It is sufficient to state that he could find none, and his affidavit will be objectionable if made several days prior to the time when it is used. A writ of *habeas corpus* is a civil proceeding or suit against those who are depriving him, as a criminal, of his civil right of personal liberty. Ex parte Tom Tong, 108 U. S. 556. For early history of the writ see Church on Habeas Corpus, ch. 1: "Personal liberty is of so great moment in the eye of the law, that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ." This matter will, however, be more fully considered in the section on assailing judgments by means of *habeas corpus*. Ex parte Parks, 93 U. S. 18; Ex parte Kearney, 7 Wheat. 38; Ex parte Wells, 18 How. 307; Ex parte Lange, 18 Wall. 163; Ex parte Virginia, 100 U. S. 339; Ex parte Siebold, id. 371; Ex parte Clarke, id. 399; Ex parte Carll, 106 U. S. 521; Ex parte Curtis, id. 371.

[1] See above, note 1, pp. 253, 254.

[2] In re Coy, 127 U. S. 731; 31 Fed. Rep. 794. See Ex parte Lange, 18 Wall. 163; Ex parte Rowland, 104 U. S. 604.

twice in jeopardy for the same offense, he may avail himself of the writ, although the court had jurisdiction over the subject-matter and case; yet, because it has no constitutional right under the facts shown of record to enter the judgment, it is void. Therefore, when the sentence exceeds the jurisdiction of the court, there is no legal authority to hold the defendant under it. Where he has been once put in jeopardy for the same offense, and this fact appears of record by plea confessed by demurrer, the court has no jurisdiction to sentence him again.[1] If, however, the court misconstrues the statute,

[1] In re Coy, 127 U. S. 759: "In Ex parte Yarbrough, 110 U. S. 651, the subject was again examined very fully. The court reiterated the doctrine that the writ of *habeas corpus* cannot be converted into a writ of error by which the judgment of the court passing the sentence can be reviewed. The court there said: 'If that court had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further.'" Hans Nielsen, Petitioner, 131 U. S. 184: "A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in Ex parte Parks, 93 U. S. 18, 22: 'If the commitment be against law, as being made by some one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the doctrine in almost the same words. 2 Hale's Pleas of the Crown, 144. And why should not such a rule prevail *in favorem libertatis?*" Ex parte Dobson, 31 Cal. 499, 500; Ex parte Kelley, 2 West. C. Rep. 719; In re Divine, 21 How. Pr. 80; People v. McLeod, 1 Hill, 391. Ex parte Fisk, 113 U. S. 718: "When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make 'inquiry into the cause of the restraint of liberty.' Sec. 752, R. S. U. S. That the case as made by the petitioner comes, for the purposes of this inquiry, within the jurisdiction of this court, under the principles above mentioned, is established by the analogous cases. Ex parte Rowland, 104 U. S. 604; Ex parte Lange, 18 Wall. 163." State v. Seaton, 61 Iowa, 564; Ex parte Kellogg, 64 Cal. 343; In re Sontag, 64 Cal. 526; Robb v. McDonald, 29 Iowa,

thereby rendering him liable when he should not be, such misconstruction is mere error of law and can only be rectified

330. Dudley v. McCord, 65 Iowa, 672: The application for a writ of *habeas corpus* was based upon the allegation that the commitment was void for the reason that the alleged contempt was merely the disobedience of an order, and the order was made in a manner in which the justice of the peace had no jurisdiction. The question presented involves a construction of the following provisions of the code, which are in these words: "Section 3692. When any person is desirous of obtaining the affidavit of another, who is unwilling to make the same fully, he may apply to any officer competent to take depositions as herein declared by petition, stating the object for which he desires the affidavit. Section 3693. If such officer is satisfied that such object is legal and proper, he shall issue his subpœna to bring the witness before him, and if he fails then to make a full affidavit of the facts within his knowledge to the extent required of him by the officer, the latter may proceed to take his deposition by question and answer in writing in the usual way, which deposition may afterwards be used as an ordinary affidavit." The application "averred in substance that to enable them to obtain the information necessary for commencing the action, they needed and desired the affidavit of E. L. Dudley, E. H. Chapman, P. C. Eldridge and M. C. Healion. The application was granted and a subpœna was issued and served upon the persons whose affidavits were desired. They did not obey the subpœna. Thereupon the justice issued a warrant and caused the persons subpœnaed to be brought before him, to show cause why they should not be punished for contempt. They made answer that they were not under obligations to obey the subpœna for reasons as follows: 'First, because there is no proceeding in any court authorizing the justice to take the testimony of any of these parties; second, the petition confers no jurisdiction to cause a summons to issue for the arrest and commitment of the witnesses, and is wholly void.' The justice, deeming the answer insufficient, adjudged the persons to be in contempt, and ordered that they be committed as above set forth. We are clear that the statute does not contemplate that persons can be forced to give affidavits which are sought merely for information. The statute provides that the witness may be brought before the officer and that his deposition may be taken, and that the deposition may afterwards be used instead of an ordinary affidavit. The use referred to is manifestly a legal use as evidence, and the justice should refuse to issue a subpœna where affidavits are not ostensibly sought for such legal use, and also where, if ostensibly sought for such use, he should be satisfied that they were not desired for such use in fact. If Higginson and Smith's petition had expressly stated that the affidavits were not sought for any use contemplated by the statute, it would manifestly have been insufficient to invoke the jurisdiction of the justice; but we cannot regard the petition as essentially different. The use stated was, we think, not contemplated by the statute; and we cannot presume that the affidavits were sought for some use not stated. The petition, then, did not purport to come within the statute, and in this

on appeal;[1] the one being an error in judgment of the court, like receiving improper evidence; the other being the exercise of the powers of the court going directly to its jurisdiction

the case differs from those above cited. Robb v. McDonald, 29 Iowa, 330; State v. Seaton, 61 id. 563. We are of the opinion, therefore, that the justice had no jurisdiction. It follows that these plaintiffs were illegally committed, and that their application to be released upon the writ of *habeas corpus* should have been sustained."

[1] Ex parte Parks, 93 U. S. 20: "But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court, and within its jurisdiction. No other court except the circuit court for the same district, having concurrent jurisdiction, was as competent to decide the question as the district court. Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case. It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment." Hans Nielsen, Petitioner, 131 U. S. 184: "The distinction between the case of a mere error in law and of one in which the judgment is void is pointed out in Ex parte Siebold, 100 U. S. 371, 375, and is illustrated by the case of Ex parte Parks as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow there was a denial or invasion of a constitutional right." Ex parte Siebold, 100 U. S. 375: "The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of Ex parte Lange, 18 Wall. 163, and Ex parte Parks, 93 U. S. 18. In the former case we held that the judgment was void, and released the petitioner accordingly; in the latter we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause, and we refused to interfere." Ex parte Mirande, 73 Cal. 371: "A writ of *habeas corpus* cannot be made the vehicle of determining mere errors where a conviction has been had and the commitment thereon is in due form. If the court below had no jurisdiction of the offense charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which, under the law, constitutes no crime, the judgment is void, and

and forbidding the rendition of any judgment whatever under the record.[1]

A court of justice may refuse to grant the writ when the application shows no grounds for the relief asked, as when the plaintiff is shown to have been committed for felony under a warrant of commitment by a tribunal having power to commit; but when it appears that the party is in custody without probable cause being shown, the writ is one of right and it should not be denied.[2] So where the final process under which he is committed does not respond to the requirement of the statute, in its material parts, the writ should issue. It should go to the jurisdiction.[3]

the prisoner should be discharged. Ex parte Kearny, 55 Cal. 214."

[1] Notes on Revised Statutes of the U. S. sec. 751: "The supreme court has no general power to review the judgments of inferior federal courts in criminal cases by *habeas corpus* or otherwise; and the writ of *habeas corpus* cannot be used to perform the functions of a writ of error (Ex parte Reed, 100 U. S. 23; Ex parte Siebold, id. 375; Ex parte Watkins, 3 Pet. 192; 7 id. 568; Re Wo Lee, 26 F. R. 476; Ex parte Curtis, 106 U. S. 371; Ex parte Mirzan, 119 id. 584), except to the territorial courts." Ex parte Hubbard, 65 Ala. 473, 474; In re Baker, 11 How. Pr. 423; Ex parte Kellogg, 6 Vt. 509; People v. Foster, 104 Ill. 156, 158; Ex parte Shaw, 7 Ohio St. 81, 82. And generally see Smith v. Hess, 91 Ind. 424; Hamilton's Case, 51 Mich. 174; Ex parte Yarbrough, 110 U. S. 652, 653, 654; In re Milburn, 59 Wis. 27; Ex parte Boland, 11 Tex. App. 161, 166; Ex parte Kauffman, 73 Mo. 589; State v. Lundy, 19 S. C. 601; People v. Kelly, 97 N. Y. 215; Singleton v. Holmes, 70 Ga. 408; Ex parte Dunklin, 72 Ala. 241.

[2] See next note.

[3] Hawes on Jurisdiction, sec. 178: "A court of justice may refuse to grant the writ when no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason, plainly expressed in the warrant of commitment; but where probable cause is shown that the party is in custody under or by authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ then becomes a writ of right, which may not be denied." Pomeroy v. Lappeus, 9 Ore. 364, 365; In re Winder, 2 Cliff. 99, 103; United States v. Lawrence, 4 Cranch, C. C. 520, 521; Ex parte Watkins, 3 Peters, 201; In re Keeler, Hempst. 308, 310, 311; In re Griner, 16 Wis. 430; In re Gregg, 15 Wis. 479, 480; Ex parte Milligan, 4 Wall. 107, 115, 116; Ex parte Campbell, 20 Ala. 93; Sims' Case, 7 Cush. 285; Ex parte Dunklin, 72 Ala. 242, 244; In re Troia, 64 Cal. 152; State v. Brewster, 35 La. Ann. 605. Ex parte Lehmkuhl, 72 Cal. 54: "But the defendant contends that as a fact in the case he was justified, by reason of a certain ordinance of the city of Oakland, in doing what would otherwise have been a violation of the state law. This ordinance he quotes at length in his petition for the writ of *habeas corpus*. Thus it appears

It has been held that error in the term of sentence is not a ground for the issuing of the writ; but surely it should be a ground for relief against the excess of the sentence beyond the highest term the court could impose.[1]

The writ may be used in any case where the imprisonment is in violation of law; hence, where an emigrant is restrained on ship-board and refused the privilege to land, under a void or unconstitutional statute, or supposed authority from the United States, the writ will issue.[2]

that the court who tried the defendant had jurisdiction of his person and the offense for which he was tried, and that it tried, convicted and sentenced him, perhaps, under an erroneous view of conflicting laws. What this court is asked to do is to restore him to liberty on a writ of *habeas corpus*, because of the error of law committed by the trial court. We do not perceive how, in such a proceeding, this court can review the alleged erroneous action of the court below. The writ of *habeas corpus* was not framed to retry issues of fact or to review the proceedings of a legal trial. Ex parte Bird, 19 Cal. 130. The petitioner's contention involves only a question of mere error, and that cannot be inquired into upon the writ here invoked, but only upon proceedings in error. Ex parte Max, 44 Cal. 579–581; Ex parte Cohn, 55 Cal. 193, and cases cited."

[1] Church on Habeas Corpus, sec. 352: "Chief Justice Cope, of the supreme court of California, said of the court committing John R. Corryell (In the Matter of Corryell, 22 Cal. 178): 'The court derives its jurisdiction from the law, and its jurisdiction extends to such matters as the law declares to be criminal, and none other; and when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction.' This principle was afterwards applied in the well-considered case of Kearny. (Ex parte Kearny, 55 Cal. 212. In 5 Pac. C. L. J. 549, the reader will find an exhaustive review of this case under the head of 'In re Denis Kearny — The writ of *habeas corpus* — Its uses and abuses.' See, also, 14 Am. Law Rev. 675, for the same article. In the decision of the court, the case of Ex parte Tobias Watkins, 3 Pet. 193, was distinguished.) He was tried and convicted and sentenced in the police court of the city and county of San Francisco, under an ordinance thereof which provides that 'no person shall address another, or utter in the presence of another, any words having a tendency to create a breach of the peace.'"

[2] Notes on Revised Statutes of U. S. sec. 753: "Refusal to permit a Chinese passenger to land is a restraint of liberty remediable by *habeas corpus*. Re Jung Ah Lung, 11 Sawyer, 211; 25 F. R. 141; 124 U. S. 621. An alien may pursue a lawful business in the United States, as, *e. g.*, a laundry business, and if he is imprisoned therefor under an act of a board of supervisors, or under a city ordinance, which conflicts with the fourteenth amendment to the United States constitution, he may be discharged on *habeas corpus*. Re Lee Tong, 18 F. R. 253; The Laundry License Case, 22 id. 701; Re Quong Woo, 9 Pac. Coast L. J. 815;

In a word, the writ issues to relieve the plaintiff from unlawful restraint of his liberty or the liberty he is entitled to, as when he has been committed without bail for an offense bailable, or when excessive bail has been required, or when a child is withheld from its parents, guardian or other person entitled to its custody, or a person is illegally restrained in the military or naval service.[1]

§ 99. Jurisdiction of the United States courts.— The jurisdiction of the supreme court of the United States to issue the writ is derived from the declaration in the constitution "that the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." All other federal courts may exercise jurisdiction by virtue of this provision.[2] The writ is

The Stockton Laundry Case, 26 F. R. 611; Yick Wo v. Hopkins, 118 U. S. 356. If, however, the concurrent jurisdiction of a circuit court is thereby brought in conflict with the decision of the highest state court, the case should be referred to the United States supreme court for final decision. Re Woo Lee, 26 F. R. 471."

[1] Church on Habeas Corpus, sec. 398: "A prisoner committed for a failure to procure bail which appears excessive possesses the right to be brought before a court on *habeas corpus*, and to have the sum reduced, if, under all the circumstances, it is thought too large. But when, under all the circumstances of the case, it clearly appears from the evidence that the defendant is unable to give such bail as the court believes sufficient to insure his appearance, the court will not, merely for the sake of reduction, reduce the amount of bail. The authority and discretion of a court having jurisdiction of an offense should be exercised in admitting to bail, increasing or reducing bail, etc., whenever substantial justice may thereby be promoted. Miller v. The State, 43 Tex. 579; Evans v. Foster, 1 N. H. 378; People v. Town, 3 Scam. 19; Ex parte Ryan, 44 Cal. 555. See Bethuram v. Black, 11 Bush, 628."

[2] Notes on Rev. Stats. of U. S. sec. 751: "The supreme court has, under the constitution, original jurisdiction to issue the writ of *habeas corpus* only in cases affecting ambassadors, other public ministers or consuls, or those in which a state is a party, so that ordinarily the writ can only be issued from that court under its appellate jurisdiction. Ex parte Hung Hang, 108 U. S. 552; Ex parte Siebold, 100 U. S. 371; Ex parte Parks, 93 id. 18; Ex parte Bollman, 4 Cranch, 75; Burford's Case, 3 id. 448; Hamilton's Case, 3 Dall. 17; Ex parte Barry, 2 How. 65; Ex parte Wells, 18 id. 307; Ex parte Kearney, 7 Wheat. 38; Barry v. Mercein, 5 How. 103; Marbury v. Madison, 1 Cranch, 137. The appellate jurisdiction extends to all other cases of federal cognizance, except as modified by congress, and to questions of fact as well as of law. Id.; Ex parte Yerger, 8 Wall. 85; Ex parte McCardle, 6 id. 318; 7 id. 506; Re Kaine, 14 How. 103; Ex parte Metzger, 5 id. 176; Wildenhus' Case, 120

grantable by common right, without any motion in court, and it instantly suspends all proceedings in the court below.

The supreme court takes by this writ jurisdiction for the purpose of revising the decision of the court below, and it is therefore appellate in its nature, as the imprisonment of the individual always precedes the application for the writ.[1] The original jurisdiction of that court extends only to cases affecting ambassadors, public ministers and consuls, and those in which a state is a party. Its appellate jurisdiction extends to all cases of which the other federal courts have cognizance, under such regulations as have been made by congress, and it may issue the writ as an appellate tribunal in all cases, protecting every citizen. "The intent of the constitution in respect to the writ of *habeas corpus* is manifest. It is that every citizen

U. S. 11; 28 F. R. 924; Re Coy, 127 U. S. 731; Ex parte Bigelow, 113 id. 328. The supreme court has no general power to review the judgments of inferior federal courts in criminal cases, by *habeas corpus* or otherwise; and the writ of *habeas corpus* cannot be used to perform the functions of a writ of error (Id.; Ex parte Reed, 100 U. S. 23; Ex parte Siebold, id. 375; Ex parte Watkins, 3 Pet. 193; 7 id. 568; Re Wo Lee, 26 F. R. 476; Ex parte Curtis, 106 U. S. 371; Ex parte Mirzan, 119 id. 584) except to the territorial courts. An appeal lies to the supreme court from the judgment of a district territorial court refusing a writ of *habeas corpus*. In re Snow, 120 id. 274. That court will not review questions arising upon the evidence offered to sustain a criminal charge. Ex parte Carll, 106 U. S. 521. It has no appellate jurisdiction over a naval court-martial. Wales v. Whitney, 114 U. S. 564; Re Bogart, 2 Sawyer, 396. Such jurisdiction appears not to extend to the case of a prisoner held in custody in extradition proceedings. Ex parte Metzger, 5 How. 176; Re Kaine, 14 id. 103; Robb v. Connolly, 111 U. S. 624. See Veretemaitre's Case, 13 Law Rep. 608. For the purposes of review, this writ is commonly used in connection with the writ of *certiorari*. Id.; Ex parte Lange, 18 Wall. 163; Ex parte Milligan, 4 id. 2; McCardle's Case, 6 id. 318; 7 id. 506; Ex parte Virginia, 100 U. S. 339; Ex parte Clarke, id. 399; Ex parte Jackson, 96 id. 727. And whenever a circuit court, in the exercise of its original jurisdiction, has caused a prisoner to be brought before it, and after investigation has remanded him back to custody, the supreme court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, review such decision, such jurisdiction being acquired through its own writ of *habeas corpus*, and there being no power to proceed until that is issued. Ex parte Royall, 112 U. S. 181; Ex parte Yerger, 8 Wall. 103; Re Stupp, 12 Blatch. 501. But the supreme court is not required to inquire into a restraint of liberty if the petitioner's case discloses that he would not be discharged. Ex parte Terry, 128 U. S. 289; 36 F. R. 428."

[1] See last note.

may be protected by judicial action from unlawful imprisonment," said Chief Justice Chase in Ex parte Yerger.[1]

The jurisdiction thus given by law to the United States circuit and district courts is original and co-extensive with the federal judicial power, unless cases are clearly excepted from it. An appeal may be taken to the supreme court in all cases where the circuit court has exercised original jurisdiction. If a person deems himself illegally restrained of his liberty, he may sue out a writ of *habeas corpus* from the circuit court; and if that court refuses to discharge him and remands him to custody, he may apply to the supreme court, which will issue a writ, accompanied by a writ of *certiorari*, to bring up the record of the proceedings below, and it will take jurisdiction under these writs.[2] If the court finds the circuit

[1] Notes on U. S. R. S. sec. 753: "The power conferred by the first clause of section 14 of the judiciary act, being given in general terms, must necessarily extend to all cases to which the judicial power of the United States extends other than those expressly excepted from it. Ex parte Yerger, 8 Wall. 101. A *habeas corpus* proceeding is an action, cause or suit, contemplating a proceeding against some person having power to produce before the court or judge the body of the person detained. Ex parte Milligan, 4 Wall. 2; Wales v. Whitney, 114 U. S. 574. It may also be a controversy between citizens of different states. Ex parte Yerger, *supra;* United States v. Williamson, 3 Am. Law Reg. 729; 4 id. 5; Bennett v. Bennett, Deady, 299; Ex parte Des Rochers, McAll. 68. A writ of *habeas corpus*, sued out by one arrested for crime, is a civil suit or proceeding against those who are depriving him, as a criminal, of his civil right of personal liberty. Ex parte Tom Tong, 108 U. S. 556. It is not 'a suit at law or in equity, where the matter in dispute exceeds the sum or value of $500,' within the removal act of 1875. Kurtz v. Moffitt, 115 U. S. 494. The revisers assumed that the writ authorized by the judiciary act would have applied to every restraint of liberty to which the judicial power of the United States extended but for the proviso which forbade all interference with prisoners in jail under state authority except when needed as witnesses in federal courts (Ex parte Dorr, 3 How. 103), and that the only effect of the subsequent acts was to do away with this restriction in the cases which they specify."

[2] Gould & Tucker's notes to the R. S. of the U. S. sec. 753: "The writ of *habeas corpus* from federal courts and judges was extended to persons in custody in violation of the constitution, or a law or treaty of the United States; and under it a person convicted by a state court of knowingly passing counterfeited national bank notes and sentenced to imprisonment could be discharged on motion in *habeas corpus* proceedings taken in the district court. Ex parte Houghton, 7 F. R. 657; 8 id. 897; Ex parte Lange, 18 Wall. 163; Brown v. United States, 14 Am. Law Reg. 566;

court erred, it will discharge the plaintiff; otherwise it will remand him.[1]

Re Ah Lee, 5 F. R. 899. So, a person convicted in a state court of perjury in an investigation before a United States commissioner under an act of congress, may now be discharged by a federal court on *habeas corpus* if imprisoned by a state court for such perjury. Ex parte Bridges, 2 Woods, 428. But the federal courts have no jurisdiction to discharge a prisoner held under a state statute which, it is claimed, violates a state and not the United States constitution. Re Brosnahan, 18 F. R. 62; 4 McCrary, 4, 11. Prior to the act of 1867 federal courts had power to apply the writ of *habeas corpus* in all cases which it would reach at common law, provided it was not issued to any person in jail who was not confined under or by color of the authority of the United States (Ex parte Des Rochers, McAll. 68), but not to surrender an imprisoned principal in discharge of his bail. United States v. French, 1 Gall. 1. It is immaterial by whom or by what authority, even though it be the court's own sentence (Re Greathouse, 4 Sawyer, 487), the prisoner is held, if the restraint is in violation of the constitution or laws of the United States (United States v. Spink, 19 F. R. 631; Re Titus, 8 Ben. 411; Ex parte Kenyon, 5 Dillon, 385; United States v. Anderson, Cooke (Tenn.), 143; United States v. Green, 3 Mason, 482; Ex parte Schmeid, 1 Dillon, 587), or its treaties. Id.; 15 A. G. Op. 181; Re Wong Yung Quy, 6 Sawyer, 237; Ex parte Tom Tong, 108 U. S. 556; Re Metzger, 5 How. 176. An Indian, being a 'person' within the meaning of federal statutes, has the right to sue out the writ. United States v. Crook, 5 Dillon, 453. In general, if the caption and detention were invalid when the writ was served, but have since been made legal, the prisoner should be discharged. Re Doo Woon, 18 F. R. 898."

[1] Notes to the R. S. of the U. S. sec. 753: "It is not material to the jurisdiction whether there has been a formal commitment or not, the sole question being whether the restraint is unlawful. Re McDonald, 9 Am. Law Reg. 661; Wildenhus' Case, 120 U. S. 11; Re Ayers, 123 id. 443. There must, however, be something more than moral restraint; something amounting to physical coercion and actual confinement. Wales v. Whitney, 114 U. S. 564; Dodge's Case, 6 Martin (La.), 569; Ex parte Meears, 3 Utah, 50. A prisoner who is held under a void order for contempt, or under an unconstitutional law, or the judgment of a court lacking jurisdiction, may be discharged under this section. Ex parte Milligan, 4 Wall. 2; Ex parte Virginia, 100 U. S. 339; Ex parte Siebold, id. 376; Ex parte Kearney, 7 Wheat. 38; Ex parte Wells, 18 How. 307; Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Yarbrough, 110 id. 651; United States v. Rogers, 23 F. R. 658, 663; Ex parte Fisk, 113 U. S. 713; Re Ayers, 123 id. 443; United States v. Hamilton, 3 Dall. 17; Re Allen, 13 Blatch. 127; Re Buell, 3 Dillon, 116; Ex parte Perkins, 29 F. R. 900; United States v. Spink, 19 id. 631. In such case the *habeas corpus* is a writ of right. Re Winder, 2 Cliff. 89; Griffin's Case, Chase, 364; Re Devoe, 1 Lowell, 251; Ex parte Geary, 2 Biss. 485; Johnson v. United States, 3 McLean, 89. If the judges of the circuit court are divided in opinion on an application

§ 100. United States district and circuit courts — Jurisdiction.— The circuit court has the same original jurisdiction conferred upon it to issue the writ of *habeas corpus* as the supreme court. Under the act of 1867 jurisdiction was conferred on the circuit and district courts to grant the writ in all cases where a person is restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States, and provision was made for an appeal, where the proceeding is commenced in the district in which the case was heard; but it does not lie to the circuit court from the application for the writ in the district court. By section 1909 of the Revised Statutes of the United States, it is provided that a writ of error or appeal shall be allowed to the supreme court from any decision of the supreme courts of "the territories" or of any of the judges thereof, of the district courts of the territories or of any of the judges thereof, upon writs of *habeas corpus* involving questions of personal freedom. The original jurisdiction of the circuit and district courts is extended to all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States.[1]

for a writ, they may certify the cause to the supreme court. Or, if the former court refuse a discharge, the prisoner may take the case to the supreme court by writ of error (Ex parte Milligan, 4 Wall. 2); but jurisdiction will not be taken on a certificate of division unless final judgment has been rendered in the case. Ex parte Tom Tong, 108 U. S. 556. Where a circuit court, in the exercise of its original jurisdiction, has remanded a prisoner whom it caused to be brought before it, the supreme court, exercising its appellate jurisdiction, may, if such action was unlawful, relieve the prisoner. Ex parte Yerger, 8 Wall. 85."

[1] Notes on Revised Statutes of U. S. sec. 763: "The district and circuit courts have always retained the original jurisdiction of *habeas corpus* conferred by the judiciary act in both civil and criminal matters. Ex parte Watkins, 3 Pet. 193; Ex parte Yerger, 8 Wall. 85; Ex parte Randolph, 2 Brock. 447; Ex parte Wilson, 6 Cranch, 52; Hecker v. Jarret, 3 Binney, 404; Ex parte Everts, 1 Bond, 197. That act gave to the circuit court no appellate jurisdiction of *habeas corpus* from the district court, and such appellate jurisdiction now exists only as provided in this section. Seavey v. Seymour, 3 Cliff. 439. The act of 1867 provided for a writ of *habeas corpus* in the case of any person restrained of his liberty in violation of any treaty with the United States, and gave an appeal as well from the circuit court to the supreme court as from a district court or judge to the circuit court; but the latter provision was repealed by section 2 of the act of 1868. Such right of appeal extended to judgments of

The general spirit and genius of our laws and the spirit of liberty prevailing in our courts have tended to enlarge the jurisdiction of the courts in *habeas corpus* proceedings so as to cover every case of illegal confinement of a person, or his illegal restraint.

the circuit courts rendered in the exercise of original jurisdiction in *habeas corpus* cases. Ex parte McCardle, 6 Wall. 318; 7 id. 506. And the repeal of the act of 1867 did not affect the appellate jurisdiction previously exercised by the supreme court in cases of *habeas corpus* under the constitution and act of congress, since acts which confer jurisdiction by appeal are construed as excluding all cases which they do not expressly provide for. Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 id. 85. The circuit court cannot, on *habeas corpus*, look behind the record to review the proceedings of a court of co-ordinate jurisdiction. Ex parte Alexander, 14 F. R. 680. And on such proceedings the record of a federal court is not defective if it does not show jurisdiction. Ex parte Watkins, 3 Pet. 193. See Church on Habeas Corpus, secs. 222–230. The circuit and district courts may issue the writ, in conjunction with a writ of *certiorari*, to revise the action of a United States commissioner, as, *e. g.*, upon the commitment by him of a fugitive from justice for surrender under an extradition treaty. Re Henrich, 5 Blatch. 414; Re Clark, 2 Ben. 540; Re Lippman, 3 id. 95; Re Byron, 18 F. R. 722; Re Cross, 20 id. 824; Re Esselborn, 20 Blatch. 1; Re Stupp, 12 id. 501; 11 id. 124; Re Macdonnell, 11 id. 79, 170; Abranches v. Schell, 4 id. 256. See Re Wildenhus, 28 F. R. 924; 120 U. S. 11; Benson v. McMahon, 127 id. 457. A circuit court commissioner cannot issue a writ of *habeas corpus* to take from confinement one held under authority of the United States, and bring him before such commissioner in order that his deposition may be taken for use in a cause pending in the district court. Ex parte Barnes, 1 Sprague, 133." Notes on Revised Statutes of U. S. sec. 764: "The words 'the last clause of' were stricken out by the statute of March 3, 1885, chapter 353 (23 Stat. 437), thereby restoring the appellate jurisdiction of the supreme court in *habeas corpus* cases over decisions of the circuit court and of the supreme court of the District of Columbia. Wales v. Whitney, 114 U. S. 564. This right of appeal is absolute and not dependent upon the discretion of the judge. Re Sun Hung, 11 Sawy. 173; 24 F. R. 723; Ex parte Milligan, 4 Wall. 22. The supreme court will not now issue the writ when it may as well be done in the circuit court and its direct action is not necessary or expedient. Ex parte Mirzan, 119 U. S. 584; Re Sun Hung, *supra*. No appeal lies to the supreme court from an order of a United States circuit judge, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of *habeas corpus*. Carper v. Fitzgerald, 121 U. S. 87. See Re Metzger, 5 How. 176; Ex parte Virginia, 100 U. S. 341; Re Kaine, 14 How. 103; Ex parte Yerger, 8 Wall. 85." Notes on Revised Statutes of U. S. sec. 765: "Such appeals from the final decisions of a district court or judge may, within the discretion of the court or judge, be sent to the circuit

§ 101. Jurisdiction affected by not giving accused a constitutional trial.— It has been held that a sentence which is not authorized by law, or which is forbidden by the constitution, is void. So is a judgment which denies to an accused person a constitutional right. In such cases the prisoner may be discharged on *habeas corpus*.[1] But it is well settled by a series

court at a term current when the appeal is taken, under regulations adapted to secure justice, and the appeal may be heard by the circuit justice at chambers if there is no objection or hardship. Roberts v. Reilly, 116 U. S. 80."

[1] See n. 2, p. 263. Ex parte Lange, 18 Wall. 175: "The force of this proposition cannot be better illustrated than by what occurs in the present case if the second judgment is carried into effect. The law authorizes imprisonment not exceeding one year, or a fine not exceeding $200. The court, through inadvertence, imposed both punishments when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced, it follows that the prisoner in the end pays his $200 fine and is imprisoned one year and five days, being all that the first judgment imposed on him and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court. But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void. But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes. We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should again be punished for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist. It is no answer to this to say

of decisions that courts cannot discharge on *habeas corpus* a person imprisoned under the sentence of a court having jurisdiction of like offenses, or over the subject-matter, unless the sentence exceeds the jurisdiction, or there is no authority to hold the prisoner under the sentence.[1] Yet if a sentence is

that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the constitution."

[1] Ex parte Hans Nielsen, 131 U. S. 182: "The first question to be considered is whether, if the petitioner's position was true, that he had been convicted twice for the same offense, and that the court erred in its decision, he could have relief by *habeas corpus*? The objection to the remedy of *habeas corpus*, of course, would be that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on *habeas corpus*. But there are exceptions to this rule, which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void, and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the cases of Ex parte Lange, 18 Wall. 163, and Ex parte Siebold, 100 U. S. 371, and in several other cases referred to therein. In the case of In re Snow, 120 U. S. 274, we held that only one indictment and conviction of the crime of unlawful cohabitation, under the act of 1882, could be had for the time preceding the finding of the indictment, because the crime was a continuous one, and was but a single crime until prosecuted; that a second conviction and punishment of the same crime, for any part of said period, was an excess of authority on the part of the district court of Utah; and that a *habeas corpus* would lie for the discharge of the defendant imprisoned on such conviction. In that case the *habeas corpus* was applied for at a term subsequent to that at which the judgment was rendered; but we did not regard this circumstance as sufficient to prevent the prisoner from having his remedy by that writ. It is true that, in the case of Snow, we laid emphasis on the fact that the double conviction for the same of-

beyond the jurisdiction of the court, if it is against an express provision of the constitution, which bounds and limits all jurisdiction, then it is void. The supreme court of the United States say: "It is difficult to see why a conviction and pun-

fense appeared on the face of the judgment; but if it appears in the indictment, or anywhere else in the record (of which the judgment is only a part), it is sufficient. In the present case it appeared on the record in the plea of *autrefois convict*, which was admitted to be true by the demurrer of the government. We think that this was sufficient. It was laid down by this court in In re Coy, 127 U. S. 731, 758, that the power of congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of *habeas corpus* as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: 'And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him.' Referring to Ex parte Siebold, 100 U. S. 371. . . . . The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in Ex parte Siebold, 100 U. S. 371, 375, and is illustrated by the case of Ex parte Parks, as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in Ex parte Parks, 93 U. S. 18, 22: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine, in almost the same words. 2 Hale's Pleas of the Crown, 144. And why should not such a rule prevail *in favorem libertatis*? If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly be stated with more categorical accuracy than it is in the opening sentence of Ex parte Wilson, 114 U. S. 417, 420, where Mr. Justice Gray, speaking for the court, said: 'It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.' This proposition, it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the circuit and district courts; but with regard to the power of discharging on *habeas corpus*, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to

ishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and pnnishment under a valid law. In the first place, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional power to condemn the prisoner."[1]

hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court because it was against an express provision of the constitution, which bounds and limits all jurisdiction. Being of opinion, therefore, that *habeas corpus* was a proper remedy for the petitioner, if the crime of adultery, with which he was charged, was included in the crime of unlawful cohabitation, for which he was convicted and punished, that question is now to be considered. We will revert for a moment to the case of In re Snow. Three crimes of unlawful cohabitation were charged against Snow, in three indictments, the crimes being laid continuous with each other, one during the year 1883, one during 1884, and one during 1885. We held that they constituted but a single crime. In the present case there were two indictments; one for unlawful cohabitation with two women down to May 13, 1888, and the other for adultery with one of the women the following day, May 14, 1888. If the unlawful cohabitation continued after the 13th of May, and if the adultery was only a part of and incident to it, then an indictment for the adultery was no more admissible, after conviction of the unlawful cohabitation, than a second indictment for unlawful cohabitation would have been; and for the very good reason that the first indictment covered all continuous unlawful cohabitation down to the time it was found. The case would then be exactly the same as that of In re Snow." See next note.

[1] In re Snow, 120 U. S. 281: "It is contended for the United States that, as the court which tried the indictments had jurisdiction over the offenses charged in them, it had jurisdiction to determine the questions raised by the demurrers to the oral pleas in bar in the cases secondly and thirdly tried; that it tried those questions; that those questions are the same which are raised in the present proceeding; that they cannot be reviewed on *habeas corpus* by any court, and that they could only be re-examined here on writ of error, if one were authorized. For these propositions the case of Ex parte Bigelow, 113 U. S. 328, is cited. But, for the reasons hereafter stated, we are of opinion that the decision in that case does not apply to the present one. The offense of cohabiting with more than one woman, in the sense of the section of the statute on which the indictments were founded, may be committed by a man by living in the same house with two women whom he had theretofore acknowledged as his wives, and eating at their respective tables, and holding them out to the world by his

Where the sentence given is beyond the jurisdiction of the court, because contrary to the provisions of the constitution, which bounds and limits all jurisdiction, the writ of *habeas*

language or conduct, or both, as his wives, though he may not occupy the same bed or sleep in the same room with them, or either of them, or have sexual intercourse with either of them. The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is inherently a continuous offense, having duration, and not an offense consisting of an isolated act. That it was intended in that sense in these indictments is shown by the fact that in each the charge is laid that the defendant did on the day named, and 'thereafter and continuously' for the time specified, 'live and cohabit with more than one woman, to wit, with the seven women named during all the period aforesaid,' 'did unlawfully claim and live and cohabit with all of said women as his wives.' Thus, in each indictment, the offense is laid as a continuing one and a single one for all the time covered by the indictment, and, taking the three indictments together, there is charged a continuing offense for the entire time covered by all three of the indictments. There was but a single offense committed prior to the time the indictments were found. This appears on the face of the judgment. It refers to the indictments as found 'for the crime of unlawful cohabitation committed during the time' stated, divided into three periods according to each indictment. For so much of the offense as covered each of these periods the defendant is, according to the judgment, to be imprisoned for six months, and to pay a fine of $300. The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half, and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years, and fines amounting to $44,000, and so on, *ad infinitum*, for smaller periods of time. . . . In the case at bar the statute provides that, if any male person shall thereafter cohabit with more than one woman, he shall, on conviction, be punished thus and so. The judgment in the case, taken in connection with the other proceedings in the record and the statute, shows, within the principle of Crepps v. Durden, that there was but one entire offense, whether longer or shorter in point of duration, between the earliest day laid in any indictment and the latest day laid in any. There can be but one offense between such earliest day and the end of the continuous time embraced by all of the indictments. Not only had the court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on *habeas corpus* when the sentence on more than one of the convictions is sought to be enforced. If such an objection could be taken in Crepps v. Durden in a collateral action for damages, it can be taken on a *habeas corpus* to release the party from imprisonment under the illegal judgment. These considerations distinguish the case from that of Ex parte

corpus will lie.[1] So where a defendant was by his consent tried by the court and not by a jury, the law requiring he should be tried by a jury, the judgment was held to be void.[2]

Bigelow, and bring it within the principle of such cases as Ex parte Milligan, 4 Wall. 2, 131; Ex parte Lange, 18 Wall. 163, 178, and Ex parte Wilson, 114 U. S. 417. A distinction is laid down in adjudged cases and in text-writers between an offense continuous in its character, like the one at bar, and a case where the statute is aimed at an offense that can be committed *uno ictu*. The subject is discussed in 1 Wharton's Criminal Law, 9th edition, secs. 27, 931, and the cases on the subject are cited. The principle which governs the present case has been recognized and approved in many cases in the United States. Washburn v. McInroy (1810), 7 Johns. 134; Mayor v. Ordrenan, 12 Johns. 122; Tiffany v. Driggs, 13 id. 253; State v. Commissioners, 2 Murph. (N. C.) 371; United States v. McCormick, 4 Cranch, C. C. 104; State v. Nutt, 28 Vt. 598; State v. Lindley, 14 Ind. 430; Sturgis v. Spofford, 45 N. Y. 446; Fisher v. New York Central & Hudson R. R. R. 46 N. Y. 644; State v. Egglesht, 41 Iowa, 574; United States v. N. Y. G. & I. Co. 8 Ben. 269; United States v. Erie R. R. Co. 9 Ben. 67, 68. The case of Commonwealth v. Connors, 116 Mass. 35, gives no support to the view that a grand jury may divide a single continuous offense running through a past period of time into such parts as it may please, and call each part a separate offense. On the contrary, in Com. v. Robinson, 126 Mass. 259, it is said that the offense of keeping a tenement for the illegal sale of intoxicating liquors on a day named, and on divers other days and times between that day and a subsequent day, is but one offense, even though the tenement is kept during every other hour of the time between those two days, such offense being continuous in its character."

[1] See last note.

[2] State v. Carman, 63 Iowa, 181: "In our code of criminal procedure there is no provision for the waiver of a jury. On the other hand, it is provided that 'an issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded.' Sec. 4350. We regard this provision as excluding the jurisdiction of the court, without a jury, to try such issue. The question presented is not as to the waiver of a mere statutory privilege, but an imperative provision, based, as we view it, upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man and always will be so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea. If the language of the statute were less imperative than it is, the adjudications would support us in reaching the same conclusion. Hill v. The People, 16 Mich. 351; State v. Maine, 27 Conn. 281; Bond v. State, 17 Ark. 290; Wilson v. State, 16 Ark. 601; League v. State, 36 Md. 257; Williams v. State, 12 Ohio St. 622; People v. Smith, 9

Therefore it is believed that a trial is not a trial, and the court has no jurisdiction, whenever the record shows that the defendant was denied a constitutional immunity or right, and as a consequence the judgment is void.[1] If a prisoner was tried out of term, or when the term had closed and the power to try had ceased by operation of law, this would render the judgment void.[2] So if the court was required to be held by three justices, and the judgment rendered by three, and only two were present and acting, this would go to the power of the court and destroy its jurisdiction.[3] Therefore, whatever goes to the jurisdiction or authority, statutory or constitutional, and affects the power so as to destroy the judgment, is an avoidance of the judgment and comes within the writ and its functions.[4]

Mich. 193; United States v. Taylor, 3 McCrary, 500." That a personal right or statutory privilege conferred on a person accused of crime may be waived by the person so accused has been held in State v. Hughes, 4 Iowa, 554; State v. Groome, 10 id. 308; State v. Ostrander, 18 id. 435; State v. Reid, 20 id. 413; and State v. Felter, 25 id. 67. But he may assent to a trial before a jury of less than twelve. State v. Kaufman, 51 Iowa, 578.

[1] See p. 276, n. 2.

[2] Where the former conviction or acquittal was procured by collusion or fraud, it may be treated as a nullity and disregarded; but the burden is on the state to prove the fraud. State v. Green, 16 Iowa, 239; State v. Maxwell, 51 Iowa, 314.

[3] In re Millington, 24 Kan. 220.

[4] See notes above and notes to § 99. People v. Pratt, 78 Cal. 347: "The facts set up in the plea and the evidence offered are to the effect that the defendant was living in Japan, as he was entitled to do, as a citizen of the United States, under a treaty existing between those two governments, when 'without any charges having been entered against him, or any legal examination had as is provided by the laws of Japan or the laws of the United States, he was, by force of arms, and against his will, brought thence into the city and county of San Francisco, in this state, where he has since been by force of arms detained, and so continues to be.' . . . If, as the defendant claims, the government had no legal right, as such, to demand and obtain his return to California, then it would seem that he was returned by means of illegal force used by that officer and his assistants, and through the wish of the Japanese government, to oblige the governor, as being the executive officer of one of the United States. While this might be said in a certain sense to be a violation of the defendant's personal right, and a kidnaping, so to speak, so far as the governor's action is concerned, it does not appear that the Japanese government has complained in any way of his act. The matter then resolves itself into this: that, as between the governor and the defendant, the latter has suffered a deprivation of personal liberty in a

§ 102. Constitutional immunities under the writ.— The constitution of the United States provides that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury; that no person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; and that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel.[1]

case where the governor had no legal power to act. The defendant being before the proper court, which had jurisdiction of his offense, it matters not how he may have entered into the presence of the court, it was its duty to try him. 'The jurisdiction of the court in which the individual is found is not impaired by the manner in which the accused is brought before it.' Mahon v. Justice, 127 U. S. 712; Ex parte Ah Men, 77 Cal. 198. . . . The governor of the state cannot oust the courts of the commonwealth of their right to try an individual charged with an offense over which they have jurisdiction, because of the fact that he has been instrumental in having the defendant there, by violation of his personal rights. It will not do to say that a fugitive from justice can escape the punishment for his crime because the governor of a state may have violated some law."

[1] Ex parte Milligan, 4 Wall. 119: "The founders of our government were familiar with the history of that struggle, and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original constitution which says 'that the trial of all crimes, except in cases of impeachment, shall be by jury,' and in the fourth, fifth and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure, and directs that a judicial warrant shall not issue 'without proof of probable cause supported by oath or affirmation.' The fifth declares 'that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service

A trial which denies or fails to secure to the accused the benefit of these provisions would not be a trial under due process of law. A court, by depriving the accused of their ben-

in time of war or public danger, nor be deprived of life, liberty or property without due process of law.' And the sixth guaranties the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries and an able bar the innocent will be saved and the guilty punished. It is in these words: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his favor for his defense.' These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original constitution was proposed for adoption it encountered severe opposition, and, but for the belief that it would be so amended as to embrace them, it would never have been ratified. . . . Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them, because the constitution expressly vests it 'in one supreme court and such inferior courts as the congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by congress. They cannot justify on the mandate of the president, because he is controlled by law and has his appropriate sphere of duty, which is to execute, not to make, the laws, and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.' But it is said that the jurisdiction is complete under the 'laws and usages of war.' It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate. They can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances, and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life in nowise connected with the military service. Congress could grant no such power; and, to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by congress, and not composed of judges appointed during good behavior."

efit, it seems, would have no power to sentence the prisoner, because he had not been tried. Such appears to be the present tenor of authority. The states have similar provisions in their constitutions if these do not apply.[1] Where the court permitted the district attorney to amend an indictment by striking material words from the charging part, the defendant was discharged after conviction, because the indictment as amended was not found by a grand jury and the trial was an unconstitutional one.[2]

[1] See note, 1, p. 272.

[2] Ex parte Bain, 121 U. S. 2: "'Comes the said Scott, as marshal aforesaid, and states that there is no sufficient showing made by the said Bain that he is illegally held and confined in custody of respondent; but on the contrary, his confinement is under the judgment and sentence of a court having competent jurisdiction to indict and try him, and he should not be released; and respondent prays the judgment of this court that the rule entered herein against him be discharged, and the prayer of the petition be denied.' The attorney-general of the United States and the district attorney for the eastern district of Virginia appeared in opposition to the motion, and thus the merits of the case were fully presented upon the application for the issue of the writ. Upon principles which may be considered to be well settled in this court, it can have no right to issue the writ as a means of reviewing the judgment of the circuit court, simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge. The jurisdiction of that court is denied in this case upon two principal grounds. The first of these relates to matters connected with the impaneling of the grand jury, and its competency to find the indictment under which the petitioner was convicted; the second refers to a change made in the indictment after it was found by striking out some words in it and then proceeding to try the prisoner upon the indictment as thus changed. We will proceed to examine the latter ground first. . . . 'This day came the parties by their attorneys, pursuant to the adjournment order entered herein on the 13th day of November, 1886, and thereupon the defendants, by their counsel, asked leave to withdraw the pleas heretofore entered, which, being granted, they submitted their demurrer to the indictment, which, after argument, was sustained, and thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words *the comptroller of the currency and*, therein contained.' . . . A verdict of guilty was found against Bain, a motion for a new trial was made, and then a motion in arrest of judgment, both of which were overruled. . . . The proposition that in the courts of the United States any part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by

§ 103. When judgment is void and when voidable.— Error does not render a judgment void nor affect it in *habeas corpus* proceedings. Therefore, when the court had jurisdiction over the subject-matter and the defendant, and power to render the

order of the court or on the request of the prosecuting attorney without being re-submitted to them for their approval, is one requiring serious consideration. Whatever judicial precedents there may have been for such action in other cases, we are at once confronted with the fifth of these articles of amendment, adopted early after the constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of rights by declaring that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury,' except in a class of cases of which this is not one. We are thus not left to the requirements of the common law in regard to the necessity of a grand jury or a trial jury, but there is the positive and restrictive language of the great fundamental instrument by which the national government is organized, that 'no person shall be held to answer' for such a crime, 'unless on a presentment or indictment of a grand jury.' . . . The learned judge who presided in the circuit court at the time the change was made in this indictment says that the court allowed the words 'comptroller of the currency' to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that with these words stricken out, it is the indictment which was found by the

judgment it gave, and tried the case in the ordinary manner, error in construing a statute is merely error of law. But not so would it be in imposing a punishment in excess of the statute. The error in the first case is simply an error of law, as

grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. . . . We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged. The sentence of the court was that he should be imprisoned in the penitentiary at Albany. The case of Ex parte Wilson, 114 U. S. 417, and the later one of Mackin v. United States, 117 U. S. 348, establish the proposition that this prosecution was for an infamous crime within the meaning of the constitutional provision. It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime, for though it has possession of the person, and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by the court in Ex parte Lange,

it does not affect or relate to the power of the court, while in the latter case the court does an act it has no jurisdiction or power to do.[1] Therefore, when the act, such as rendering a judgment it had no power to render, is done, such act is not a judicial one; but if the court errs in making a ruling it has power to make, although it may be erroneous, it is not void. When a court steps beyond the power the legislature has given it, its acts are void; hence a sentence imposed after it appears the prisoner has been sentenced for the same offense is void, because the law says the prisoner shall only be punished once, and the second punishment cannot be inflicted.[2]

18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Wilson, 114 U. S. 417, and other cases."

[1] Ex parte Curtis, 106 U. S. 375: "Our inquiries in this class of cases are limited to such objections as relate to the authority of the court to render the judgment by which the prisoner is held. We have no general power to review the judgments of the inferior courts of the United States in criminal cases, by the use of the writ of *habeas corpus* or otherwise. Our jurisdiction is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted. Ex parte Lange, 18 Wall. 163; Ex parte Rowland, 104 U. S. 604." This language is quoted with approval in Ex parte Carll, 106 id. 521.

[2] Ex parte Rowland, 104 U. S. 612: "The single question we have to consider on this application is whether the order of the circuit court, made on the 21st of November, is sufficient authority to the marshal for the detention of the persons he holds under it; and that question, as is conceded on both sides, depends entirely on the power of the circuit court to require the court of county commissioners to do what its members have been held to be in contempt for not doing. If the command of the peremptory writ of *mandamus* was in all respects such as the circuit court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void; and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Siebold, 100 id. 371; Ex parte Virginia, id. 339." Church on Habeas Corpus, sec. 368: "For instance, if the indictment charges the offense to have been committed within certain territorial limits, over which the court has jurisdiction, and the jurisdiction is admitted by pleading over, that ends the matter. But if that allegation is traversed and the jury find that the prisoner committed the offense within the jurisdiction of the court, as alleged, the defendant cannot impeach that finding on *habeas corpus* by showing that the place where the offense was committed is without the said territorial limits. In re Newton, 16 Com. B. 97; S. C. 30 Eng. L. & Eq. 432. See Reg. v. Newton et al. 1 Jur. (N. S.) (Q. B.) 591; Ex parte Edgington, 10 Nev. 215; State of Louisiana v. Fenderson, 28

And when the court has no power to render a judgment against a prisoner except when he is tried by a jury, the same result follows, because the sentence must be preceded by a conviction, and such a sentence is without any lawful conviction.[1] So if the defendant is tried out of the state or district where the crime was committed, the trial is a nullity and the judgment is void. Or if the defendant, being placed on trial, was denied the right of counsel guarantied him by the constitution, there is no rightful conviction; for he has had no trial, and the conviction only follows a trial. So, if a defendant was refused a subpœna for witnesses in his favor, or refused the right of having the indictment read to him, or any constitutional immunity, the sentence is void.[2] Such immunities are

La. Ann. 82; People ex rel. Tweed v. Liscomb, 60 N. Y. 571; S. C. 11 Alb. L. J. 396; Deckard v. The State, 38 Md. 186. . . . Finally, if the court be found to have jurisdiction of the person, subject-matter, and to render the particular final judgment rendered, no further inquiries can be made on *habeas corpus*. Ex parte Twohig, 13 Nev. 302; Ex parte Toney, 11 Mo. 661; Lumly v. Quarry, 7 Mod. 9; Anon., id. 118."

[1] See § 102, and notes.

[2] See same, and also Howard v. People, 3 Mich. 207; Ex parte Hunter, 16 Fla. 575. Church on Habeas Corpus, secs. 354, 356: "To show a want of competent authority in a court rendering a judgment, enough facts should appear in the application for a writ of *habeas corpus* to enable the court to form some judgment on the case. Where the statute requires three justices to hold a court, the prisoner may impeach the judgment rendered by two of them by showing that one of the justices named was in fact absent — thereby showing that the court was not legally constituted. Jurisdiction may always be impeached by showing the fact that it does not exist, but ordinarily neither error nor irregularity can be assailed. The want of power to hear and determine, and not error or irregularity in the exercise of that power, renders a judgment void. This principle runs through most of the authorities. For the specified cases in which a party may be discharged on *habeas corpus* from custody under process of a legally constituted court, the reader is referred to the statutes of his own state. People ex rel. Stokes v. The Warden, etc. 66 N. Y. 342; People v. Lincoln, 25 Hun, 306. See Ex parte Simmons, 62 Ala. 416. That a prisoner convicted and sentenced by a court of competent jurisdiction to perform hard labor for the county during a specified term cannot be punished by a confinement in jail for such period, see Ex parte Pearson, 59 Ala. 654; and that the better practice is, where an alternative sentence is passed of fine and imprisonment, for the judge who sentences to fix some reasonable time within which the prisoner may pay the fine, see Broomhead v. Chisolm, 47 Ga. 390. If that is not done, the prisoner is entitled to a reasonable time within which to pay the fine; and if the fine be paid

part of the mode of trial, and their refusal goes to the power of the court as much as if sentenced without being indicted at all.

within a reasonable time, and is accepted by the officer authorized to receive it, the prisoner is entitled to his discharge." Wharton's Criminal Law (8th ed.), sec. 145, n. 2, and sec. 145*a*: "Of this we have a remarkable illustration in a Pennsylvania case in 1826, in which it was held that an agreement not to bring a writ of error in a criminal case, especially one of high degree, does not estop the defendant from bringing such writ. The question arose after a conviction of burglary, where it was alleged that the defendant had agreed in writing not to bring a writ of error, and where a motion to quash the writ was on this ground made. But Tilghman, C. J., in refusing the motion, said: 'What consideration can a man have received adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement; yet the principle is in both cases the same.' Smith v. Com. 14 S. & R. 69. Constitutional rights to trial by an independent jury, whose deliberations are to be guarded against outside interference, are to be placed in the same category. These a defendant cannot waive." Grignon's Lessee v. Astor, 2 How. 338; In re Bogart, 2 Saw. 401; Ex parte Watkins, 3 Pet. 203. An indictment must contain the statement of an offense known to the law. Under the rule well settled by judicial decisions that this may be inquired into, on an application for a discharge, if no offense is alleged the prisoner must be given his liberty as a matter of right. In Matter of Corryell, 22 Cal. 178; Kearny's Case, 55 Cal. 212; Ex parte Boland, 11 Tex. App. 159; Ex parte Siebold, 100 U. S. 376; Miller v. Snyder, 6 Ind. 1; Johnson v. United States, 3 McLean, 89; People v. Liscomb, 60 N. Y. 559. United States v. Jackalow, 1 Black, 486: "The second section of the third article of the constitution provides that 'the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the crimes shall have been committed, but when not committed within any state the trial shall be at such place or places as the congress may by law have directed.' A material question in this case, in view of this provision of the constitution, was whether or not the offense was committed out of the jurisdiction of any particular state, because, if not, inasmuch as it was not committed within the state of New Jersey, the circuit court of the district of that state had no jurisdiction. That jurisdiction depends upon two facts: First, that the offense was committed out of the jurisdiction of any other of the states of the Union; and second, that the prisoner was first apprehended in the district of New Jersey. Crimes committed against the laws of the United States, out of the limits of a state, are not local, but may be tried at such place as congress shall designate by law, but are local if committed within the state. They must then be tried in the district in which the offense was committed. 15 How. 488; 6th amendment of the constitution of U. S. In many of the statutes prescribing offenses against the laws of the United States there is an express limitation exclud-

§ 104. Distinction between error and want of jurisdiction. The characteristic distinction between the jurisdictional and non-jurisdictional errors pointed out in the preceding section is important to the reader, and rests upon the ground of the oc-

ing offenses committed within the jurisdiction of a state. The acts of 1790 and 1825 are of this description. Under these statutes, the question presented in this case could not arise, as the offense could not be committed within the limits of the state. We agree, however, that the omission of the limitation in the act of 1820 constitutes no objection to the legality and force of the act, as it is competent for congress to prescribe the punishment of offenses committed on the high seas, open roadsteads, in any haven, basin or bay, or in any river where the sea ebbs and flows, as there described, although within the limits of a state. But in these cases, as we have seen from the constitutional provision referred to, the indictment and trial must be in a district of the state in which the offense was committed. Now, the special verdict finds that the offense in this case was committed upon the 'Spray,' lying in waters adjoining the state of Connecticut, between Norfolk harbor and Westchester county in New York, at a place five miles eastward of Lyon's Point, and a mile and a half from the Connecticut shore. Whether this place thus described is out of the jurisdiction of a state or not is not found, and is, of course, necessarily left to the court to determine. The learned judge of the district court, sitting in the circuit with the presiding judge, in a very carefully considered examination of the question, came to the conclusion that the place where the offense was committed was within the jurisdiction of New York; and it appears that two of the eminent judges of the highest court of the state of New York entertained different opinions on this question. 3 Selden, 295." Manley v. People, 3 Selden, 302 (Edmonds, J.): "I cannot recognize the doctrine contended for by the prisoner's counsel, namely, that as the offense was committed in the Sound, and thus came within the jurisdiction of the United States courts, the state courts have no jurisdiction. Each government punishes for itself offenses against itself; and because the United States courts have cognizance of an offense on our tide-waters, it by no means follows that the state authorities may not also take cognizance of it. The jurisdiction of the federal authorities is not exclusive, except where it is attended by a cession of territory or expressly made so by a law of congress in cases where congress has the power to legislate. Now, here was no cession of territory, nor is exclusive jurisdiction given by the United States statutes to the United States courts over offenses, except where they are offenses against the laws of the United States. So, while it would not be competent for the state tribunals to take cognizance of an act that was made a crime only by the laws of the United States, they may take cognizance of the same act if it is also made a crime by the state laws. For then each government would punish offenses against itself, and in matters over which the state authorities had jurisdiction originally this concurrent power must exist, unless it be determined that the same act cannot at the same time be an offense against both governments. If it may be so, and I see no reason why it should

currence or omission of some act that precedes the sentence and deprives the court of the power to pass sentence; or that the court by its own act renders a judgment the law does not give it the power to render.

not, then it must be that each government must have power to punish the same act as an offense against each jurisdiction. It may, however, be that this will involve the hazard of a man's being punished twice for the same offense. But against this there is a practical and sufficient remedy which is growing up in the practice of the several federal and state courts as congress extends its power by its enactments, and that is in allowing the judgment in one court to be pleaded in bar in the other. Houston v. Moore, 5 Wheat. 1; 1 Kent, Com. 399." In re Mills, 135 U. S. 270: "A sentence simply of imprisonment, in the case of a person convicted of an offense against the United States, where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary, cannot be executed by confinement in a penitentiary, except in cases in which the sentence is 'for a period of longer than one year.' In neither of the cases against the accused was he sentenced to imprisonment for a period longer than one year. In one case the imprisonment was 'for the term and period of one year;' in the other, 'for the term and period of six months.' There is, consequently, no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers. Ex parte Lange, 18 Wall. 163, 176; Ex parte Parks, 93 U. S. 18, 23; Ex parte Virginia, 100 U. S. 339, 343; Ex parte Rowland, 104 U. S. 604, 612; In re Coy, 127 U. S. 731, 738; Hans Nielsen, Petitioner, 131 U. S. 182." Reynolds v. United States, 98 U. S. 158: "The constitution gives the accused the right to a trial, at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The constitution does not guaranty an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. In Lord Morley's Case, 6 State Trials, 770, as long ago as the year 1666, it was resolved in the house of lords 'that in case oath should be made that any witness, who had been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer that if their lordships were satisfied by the evidence they had heard that the witness was de-

The judgment is vitiated only by reason of want of power to enter it. If the statute which purports to give it is invalid because beyond the authority of the legislature to pass it, then the act of the court fails. Hence a judgment rendered pursuant to an unconstitutional law rests on the same basis as though the court entered a judgment for the execution of a man convicted of a misdemeanor.

The court, having jurisdiction of the subject-matter and of

tained by the means or procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships.' This resolution was followed in Harrison's Case, 12 id. 851, and seems to have been recognized as the law in England ever since. In Regina v. Scaife, 17 Ad. & E. (N. S.) 242, all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. Drayton v. Wells, 1 Nott & M. (S. C.) 409; Williams v. State, 19 Ga. 403. So that now, in the leading text-books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Greenl. Ev. sec. 163; 1 Taylor, Ev. sec. 446. Mr. Wharton (1 Wharton, Ev. sec. 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called; but in reality his statement is the same as that of the others, for in all it is implied that the witness must have been wrongfully kept away. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one." Cooley's Constitutional Limitations (5th ed.), *334: "With us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel. And generally it will be found that the humanity of the law has provided that if the prisoner is unable to employ counsel the court may designate some one to defend him, who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions in the defense of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so."

the defendant, may, by reason of errors not going to the merits, enter a judgment voidable on appeal; but such errors cannot be reviewed by *habeas corpus*. An irregularity is the want of adherence to some prescribed rule or mode of proceeding; it consists in either omitting something that should be done for the orderly conduct of a suit, or doing something in an unseasonable time. While void and voidable judgments may be reversed on appeal, it is from custody under the void judgment that *habeas corpus* releases the prisoner. Illegality differs from error in this: the one denotes a complete failure of the proceedings, the other, an error that may be waived.

A complaint or indictment may charge the commission of an unlawful act, without charging it sufficiently; but the defendant by not filing a demurrer may waive the informality.[1] So no insufficiency in a record as to matters of form not going to jurisdiction will justify the discharge of a prisoner. If the judgment recites the offense generally, of which the one of which defendant was convicted was included, it is sufficient.[2]

[1] Church on Habeas Corpus, secs. 245, 246: "An indictment must contain the statement of an offense known to the law, and, under the rules well settled by judicial decision that this may be inquired into, if the court or judge determines that it does not, the prisoner must be discharged as a matter of right, particularly in those states where a statute provides that he shall be discharged when the process, though proper in form, has been issued in a case not allowed by law. Where the court renders such a judgment on the record as the law demands, and, on taking the whole record together, in investigating a proceeding on *habeas corpus*, and where a defective indictment is the point in controversy, is satisfied that enough appears, although the indictment is clearly defective, and so much so that a demurrer to it would be sustained, to retain the accused in custody until another term of court, it will not discharge the prisoner. A defect in an indictment for an assault with intent to commit murder, consisting in leaving out the name of the person assaulted, and without any averment that the person's name was 'to the grand jury unknown,' is not a sufficient ground upon which to discharge an accused party on *habeas corpus* in vacation, and it is doubtful whether it would be sufficient in term time. The next court where the indictment is found after the hearing can either discharge the party or permit the defective indictment to be nol. prossed, and order another one to be preferred, or the first indictment may be amended by consent of the accused. The indictment should, however, at first contain the name of the person assaulted."

[2] In Kansas a complaint filed under the dram-shop acts so defective that a motion in arrest of judgment would have been sustained, as it failed to charge in terms a sale with-

On the other hand, when the statute requires that the court shall be held by three justices, and it is in fact held by two of them, the plaintiff in *habeas corpus* proceedings may show that the judgment was rendered by two only, and that the third was in fact absent and did not act; this goes to the legality of the court and renders the judgment void.[1] In all cases, when the facts going to the jurisdiction do not appear of record, the plaintiff may, for the purpose of impeaching the jurisdiction show the facts as they existed.[2] But the record should be made up so as to disclose all the facts, because if the court was one of general jurisdiction, or a recital of jurisdiction is made in the record, such recital cannot be contradicted in a collateral proceeding. *Habeas corpus* does not operate as an appeal, writ of error, or *certiorari*, but does operate so far as to permit want of jurisdiction to be shown to defeat the judgment, as that goes to the power of the tribunal, or the validity of the judgment itself, rendering the latter void.[3]

out license, but contained a general charge of unlawful selling, was held not to be such an absolute nullity as to entitle a defendant to a discharge on *habeas corpus* after he had pleaded and gone to trial and had been convicted and sentenced. Prohibitory Amendment Cases, 24 Kansas, 700; Ex parte Gibson, 31 Cal. 619.

[1] Church on Habeas Corpus, sec. 198: "Where the law required that there must be three police justices to hold a competent court of special sessions in the city of New York, and upon the return to a writ of *habeas corpus*, the imprisonment was justified under a commitment in due form, showing that the prisoner had been regularly tried and convicted of petit larceny before a court of special sessions held by three police justices, evidence *aliunde* that only two of the police justices were present when the prisoner was arraigned and pleaded, and when he was tried and sentenced, was held to be competent for the prisoner to show that the proceedings before the court of special sessions were *coram non judice* and void. People v. Divine, 5 Park. Cr. 62; S. C. 21 How. Pr. 80. It will readily be seen that the effect of the evidence in this instance was to prove the want of jurisdiction, thus rendering the proceeding void."

[2] People v. McLeod, 1 Hill (N. Y.), 377.

[3] Church on Habeas Corpus, secs. 211, 342: "In Texas, it is said by P. Evans, justice of the supreme court, quoting the words of Justice Lawrence, in Welch v. Nash, 8 East, 403, that 'justices cannot of course give themselves jurisdiction by erroneously and capriciously deciding contrary to the truth upon the question upon which the jurisdiction depends. Justices cannot give themselves jurisdiction by finding that as a fact which is not a fact.'" Holman v. Mayor of Austin, 34 Texas, 668. As to whether a prisoner after being discharged can be again committed for the same offense, see conflicting cases of Yates, 4 Johns. 317; Yates v. Lansing, 9 id. 395; Yates v. The People, 6 id. 337.

§ 105. Voidable judgments.— Gross and flagrant irregularities may be committed or permitted in a trial without divesting the court of power to act and to pronounce judgment. The validity of such proceedings cannot be tested by suing out a writ of *habeas corpus*. The only questions open for examination on the hearing of the return are those which go to the jurisdiction — as want of power to try, to render the judgment complained of, or any judgment whatever. It all the time points to, and makes the attack on, the jurisdiction in some form or manner, striking at the tap-root of the proceeding — the power of the court which tried the cause.[1]

A judgment is voidable although it was rendered by a court of competent jurisdiction in a cause which it had power to try, and notwithstanding the authority existed to render the particular judgment in the case in which it was given, if, during the course of the proceedings prior to the conviction of the defendant, the court erroneously committed or permitted an error or irregularity that was prejudicial to him. Such errors are familiar to the profession, but nice distinctions often arise as to their effect upon a judgment — whether they render it void or merely voidable.[2]

[1] See *post*, § 110, note 1. Church on Habeas Corpus, pp. 493, 494: "The decisions of that high tribunal, the supreme court of the United States, are everywhere respected, and since the judgment of that court in the late case of Ex parte Siebold was rendered, the proposition there laid down . . . will hardly be questioned. And if the petitioner for a writ of *habeas corpus* can have the constitutionality of a law under which he is convicted and sentenced inquired into, there would seem to be a much stronger reason for inquiring into the reason of the prisoner's detention when he alleges that he has been convicted and sentenced under no law at all. It is impossible to reconcile the latter class of decisions with the first. . . . But we apprehend the true rule to be that when a prisoner alleges that the law under which he is convicted and sentenced is unconstitutional, or has been repealed before the trial and judgment, that he may have these matters passed upon by the highest judicial tribunals, whether the attack upon the judgment be collateral, as by *habeas corpus*, or direct, as by appeal or writ of error. The decision in Ex parte Siebold will probably tend to henceforth harmonize the decisions on this question."

[2] The jurisdiction of the court to render the particular judgment is always a proper subject of inquiry; it is not enough to have simply jurisdiction of the prisoner and the subject-matter to render any judgment valid. It matters not what the general powers and the authority and jurisdiction of a court may be, if it act without authority in the particular case its judgments and orders

§ 106. Excessive sentence.— An excessive sentence is one that exceeds the limit prescribed by law. Where the court has power to inflict a sentence of the nature, kind and character of the one pronounced, but not to its amount, term or extent, the excess, according to the best authorities, is absolutely void.[1] As where it has imposed a fine of $200 when

are mere nullities, not voidable, but simply void; protecting no one acting under them, and constituting no hindrance to the prosecution of any right. It may be here observed that statutes which prohibit the review of the jurisdiction of a court of competent jurisdiction apply only to such judgments as may be shown, by the record or otherwise, to be simply erroneous, and not to those judgments which could not, under any circumstances or upon any state of facts, have been pronounced. A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes. The writ of *habeas corpus* cannot be used as a writ of error. Mere error in the judgment or proceedings under and by virtue of which a party is imprisoned constitutes no ground for the issuance of the writ. Elliott v. Piersol, 1 Pet. 340; People ex rel. Tweed v. Liscomb, 60 N. Y. 559; S. C. 11 Alb. L. J. 396; Justice Miller in Ex Parte Lange, 18 Wall. 175; Ex parte Siebold, 100 U. S. 371; Ex parte Bond, 30 Am. Rep. 20; S. C. 9 S. C. 80.

[1] Ex parte Watkins, 7 Peters, 572: "The award of the *capias ad satisfaciendum* must be considered as the act of the circuit court, it being judicial process, issuing under the authority of the court. The party is in custody under that process. He is then in custody, in contemplation of law, under the award of process by the court. Whether he is rightfully so is the very question now to be decided. If the court should, upon the hearing, decide that the *capias ad satisfaciendum* justifies the present detainer and should remand the prisoner, it would be clearly an exercise of appellate jurisdiction; for it would be a revision and confirmation of the act of the court below. But the jurisdiction of the court can never depend upon its decision upon the merits of a case brought before it, but upon its right to hear and decide it at all. In Marbury v. Madison, 1 Cranch, 137, it was said that it is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. . . . The *capias ad satisfaciendum* then in this case was properly awarded. It was a necessary process to recover the fine. The difficulty is that no return was ever made to the court at the return day by the marshal, nor, indeed, until long after the marshal's office had expired. Watkins was never brought into court, nor committed by the order of the court. He is now held in jail, and has, ever since the return term, been held in jail solely upon the *capias ad satisfaciendum*, which became *functus officio* after the return day. He might have been arrested and detained in jail, if he had not been previously in custody, until the return day, but his detention afterwards was

the statutory penalty is only $100, the prisoner may be discharged on paying the latter sum. So if the statute imposes a penalty of only six months' imprisonment and the court imprisons for a year, the sentence is void as to the excess; some

not, in our judgment, justified by the process. In every view which we have been enabled to take of the case, we cannot find any principle or authority to justify his detention. Doubtless the detention has been in entire good faith, under a mistake of the law. But this cannot vary the results." Ex parte Lange, 18 Wall. 177. Bigelow v. Forrest, 9 Wall. 339: "It is argued, however, on behalf of the plaintiff in error, that the decree of confiscation of the district court of the United States is conclusive; that the entire right, title and interest of French Forrest was condemned and ordered to be sold, and that as his interest was a fee-simple that entire fee was confiscated and sold. Doubtless a decree of a court having jurisdiction to make the decree cannot be impeached collaterally, but under the act of congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction." In Ex parte Lange, *supra*, the court say: "The doctrine of that case is re-affirmed in the case of Day v. Mecou, at the present term, where it is said that in Bigelow v. Forrest 'we also determined that nothing more was within the jurisdiction or judicial power of the district court (than the life estate), and that consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale.'" Ex parte Lange, 18 Wall. 166: "The authority of this court in such case, under the constitution of the United States, and the fourteenth section of the judiciary act of 1789, to issue this writ, and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer open to question. The cases cited in the note below will, when examined, establish this proposition as far as judicial decision can establish it. Hamilton's Case, 3 Dallas, 17; Burford's Case, 3 Cranch, 448; Ex parte Bollman, 4 id. 75; Ex parte Watkins, 3 Peters, 193; S. C. 7 id. 568; Ex parte Metzger, 5 How. 176; Ex parte Kaine, 14 id. 103; Ex parte Wells, 18 id. 307; Ex parte Milligan, 4 Wallace, 2; Ex parte McCardle, 6 id. 318; S. C. 7 id. 506; Ex parte Yerger, 8 id. 85." Ex parte Wilson, 114 U. S. 420: "It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence. Ex parte Watkins, 3 Pet. 193; Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Siebold, 100 U. S. 371; Ex parte Curtis, 106 U. S. 371; Ex parte Carll, 106 U. S. 521; Ex parte Yarbrough, 110 U. S. 651; Ex parte Crouch, 112 U. S. 178; Ex parte Bigelow, 113 U. S. 328." People ex rel. Trainor v. Baker, 89 N. Y. 460, citing Matter of Sweatman, 1 Cow. 144; People ex rel. Tweed v. Liscomb, 60 N. Y. 559; S. C. 19 Am. Rep. 211; 11 Alb. L. J. 396; People ex rel. Woolf v. Jacobs, 66 N. Y. 8.

courts have declared the entire judgment void. And where a court may enter an alternative judgment, as a fine or imprisonment, and it renders judgment imposing both, and the prisoner complies with the portion imposing the fine by paying it, and at the same term, after the payment, the court corrects the judgment by entering another for the imprisonment only, the judgment last entered is void, the law being satisfied with the payment of the fine.[1]

If the judgment entered was one the court had no power at all to render, as when a court inflicts punishment such as imprisonment in a penitentiary when the maximum penalty it could legally inflict was imprisonment in jail, the entire judgment is absolutely void, and the plaintiff in *habeas corpus* will be entitled to a discharge.[2]

§ 107. Cumulative sentence.— Whether two distinct, separate offenses can be joined in the same indictment, or whether a compound offense committed at the same time may be joined and tried in the single trial,— whether a defendant who has committed a series of acts, all criminal and all similar, in the business he has improperly and unlawfully been engaged in, may be tried on all of them before the same court at the same time, and receive separate sentences and judgments for each offense of the series,— is not so much a question of jurisdiction as of practice; and practically rests in legislative wisdom and power, rather than in any fixed rule of law. In the celebrated

[1] See last note.

[2] Church on Habeas Corpus, sec. 374: "Of course there is no difficulty in impeaching a judgment on this writ where no jurisdiction to render it, or any part of it, exists at all. For example, where it is attempted, by a decree of divorce rendered in one state on service by publication, to fix the custody of minor children then in another state, such a judgment is without jurisdiction and void. Ex parte Bulger, 60 Cal. 438; Kline et al. v. Kline, 57 Iowa, 386. So in Com. v. Kirkbride, 7 Phila. 8; S. C. 2 Brews. 419, it was held in Pennsylvania that the judgment of every sister state was just as conclusive there as a judgment rendered in a Pennsylvania court, but that a foreign judgment could be attacked anywhere for fraud or absence of jurisdiction. Hence, a finding of lunacy in another state was, on *habeas corpus*, held to be of no binding effect in Pennsylvania, where it appeared that no notice of the proceedings had been given. As to service of process, though it is not a *habeas corpus* case, it will not be unprofitable to read Pennoyer v. Neff, 95 U. S. 714, where some very important doctrines are enunciated."

Tweed Case in New York the basis of the decision rested on statutory construction, whereby and under which the court held that the law did not authorize separate convictions on a single trial, but required a conviction under distinct, separate indictments; hence the jurisdiction of the court was exhausted when the single judgment was entered, and the entry of judgments on the several other convictions under the same indictment was *coram non judice* and void.[1] Precisely the contrary rule has been held under different practice statutes by the highest state and national courts.[2] The reader will therefore consult the constitutional and statutory provisions in regard

[1] People ex rel. Tweed v. Liscomb, 60 N. Y. 559. The court had jurisdiction to impose a sentence for each crime of which the relator was convicted, and the joining of several charges in one indictment did not oust the court of jurisdiction to impose punishment for more than one crime. Gregory v. Regina, 15 Q. B. 974, 19 L. J. Q. B. 366; United States v. Hudson, 7 Cranch, 32; United States v. Coolidge, 1 Wheat. 416; United States v. O'Callahan, 6 McL. 596; Rex v. Kingston, 8 East, 46; Reg. v. Galloway, 1 Moody's C. C. 234; Rex v. Johnson, 3 M. & S. 549; Rex v. Jones, 2 Camp. 132; O'Connell's Case, 11 Cl. & F. 155; Reg. v. Fussell, 3 Cox's C. C. 291; Carlton v. Com. 5 Metc. 532; Josslyn v. Com. 6 id. 236; Crowley v. Com. 11 id. 575; Com. v. Hills, 10 Cush. 530; Com. v. Carey, 103 Mass. 214; State v. Tuller, 34 Conn. 280–282; Com. v. Birdsall, 69 Penn. 482; State v. Gummer, 22 Wis. 421; State v. Kirby, 7 Mo. 317; People v. Costello, 1 Den. 83; Kane v. People, 8 Wend. 214; People v. Rynders, 12 id. 429; People v. Baker, 3 Hill, 159; Hodgman v. People, 4 Den. 235. An action in which several penalties are joined can be maintained. City of Brooklyn v. Cleves, H. & D. Sup. 231; Johnson v. H. R. R. Co. 2 Sweeny, 298; Fisher v. R. R. Co. 46 N. Y. 659; Mieir v. McMillan, 51 Iowa, 241.

[2] 19 Am. Rep. 212. A prisoner cannot be tried at the same time for two distinct and separate crimes upon one indictment, if objection is made. State v. Fowler, 8 Fost. (N. H.) 184; State v. Lincoln, 49 N. H. 464; 1 Bish. Cr. Proc. secs. 205–213; State v. Porter, 26 Mo. 201; Hampton v. State, 8 Humph. 69; McGregg v. State, 4 Blackf. 101; Baker v. State, 4 Ark. 56; Kane v. People, 8 Wend. 203; United States v. Pirates, 5 Wheat. 201; State v. Canterbury, 28 N. H. 216; State v. Flye, 26 Me. 312; State v. Marvin, 35 N. H. 26; Whart. Cr L. 204, 207; 1 Arch. Cr. Pl. 95; Reg. v. Davis, 8 F. & F. 19; Reg. v. Barry, 4 F. & F. 389; Reg. v. Burch, id. 407; In re Murphy, 8 C. & P. 297; Rex v. Britton, 1 M. & R. 297; O'Connell's Case, 11 Cl. & Fin. 374; King v. Roberts, Carth. 226; King v. Clendon, 2 Ld. Raym. 1572; 2 Str. 870; 2 Sess. Cas. 24; Young v. King, 3 T. R. 105. The criminal courts had not power, by the common law, to sentence a defendant to be imprisoned for a term commencing at a future day. Son v. People, 12 Wend. 348; King v. Regina, 9 Jur. 833; Miller v. Allen, 11 Ind. 387; James v. Ward, 2 Metc. (Ky.) 271; Ex parte Meyers, 44 Mo. 279. Cumulative penalties are not, as

to this question and then determine. It is not necessarily a jurisdictional question, and like other questions of the kind depends on the local practice act or constitutional limitations.

§ 108. The return to the writ.— As the writ of *habeas corpus* is always addressed to the defendant and requires him to show cause why he holds the plaintiff in custody, the defendant should by return show cause why the plaintiff is detained. I cannot go into this subject so as to show the practice of the courts, but can only consider such questions as are jurisdictional. Courts have power to compel a return by attachment where there is a wilful disobedience, although ordinarily a rule is issued on the defendant to show cause why an attachment should not issue.[1] A failure to make a return is a con-

a general rule, recoverable in this state in one action. Sturgis v. Spofford, 45 N. Y. 446; Fisher v. N. Y. C. R. R. Co. 46 id. 644; Brooklyn v. Toynbee, 31 Barb. 283; Clark v. Lisbon, 19 N. H. 288; 50 Barb. 573; Kane v. People, 8 Wend. 203; Guenther v. People, 24 N. Y. 101; Reg. v. Cutbush, 10 Cox's Cr. Cas. 489; People v. Wright, 9 Wend. 193; Barb. Cr. L. 319, 338, 372; People v. Costello, 1 Den. 83; People v. Rynders, 12 Wend. 425; People v. Baker, 3 Hill, 159; Nelson v. People, 23 N. Y. 293; People v. Davis, 36 id. 78; Woodford v. State, 1 Ohio St. 427; State v. Nelson, 8 N. H. 163; State v. Merrill, 44 id. 624; Glines v. Smith, 48 id. 270; Fisher v. State, 33 Tex. 792; United States v. Dickinson, 2 McLean, 325.

[1] If he refuse to do so, he is liable for the first offense to a penalty of one hundred pounds, and for the second, two hundred pounds. It is no excuse for not complying with the writ, as we have elsewhere seen, that the prisoner has not paid to the jailer the charges allowed by the act for his conveyance, as the court will allow them on the return. The question of personal liberty has long been held to be the subject of so much concern that upon disobedience to a writ of *habeas corpus* courts and judges will not first grant the indulgence of a rule to return the writ, but will require all the expedition possible. . . . In the state of New Jersey a writ of *habeas corpus* was directed to the defendant to bring up several colored persons. The sheriff of Somerset sent up a copy of the writ, with a certificate of service indorsed upon it. The defendant did not appear or return the writ, and it was suggested that he intended to depart the state, taking with him the persons named in said writ. It was therefore moved that an attachment writ issue, but it was refused, because the return and evidence were insufficient. At a subsequent day the affidavit of William Hoagland was read, proving the service of the *habeas corpus;* and it appearing that the said writ had not been returned by the defendant, it was on motion ordered that an attachment forthwith issue against him for contempt of the court in disobeying the said writ of *habeas corpus.* State v. Raborg, 2 South. (N. J. L.) 545; In re Kemp, 16 Wis. 379; Ex parte Field, 5 Blatchf. 88.

tempt, as also is the making of a false, evasive or insufficient one.[1]

If the return shows no cause for holding the plaintiff he will be discharged; if it shows good cause, and the facts are not contradicted, the prisoner will be remanded and the writ be quashed or dismissed.[2] The return *prima facie* imports verity.[3] The body of the complainant must be produced, or reasons given for not so doing. If the body be not produced the return will be very cautiously scanned by the court, and if found evasive the defendant will be proceeded against for contempt.[4]

§ 109. What facts may be shown against return to aid the plaintiff.— In *habeas corpus* proceedings the court will inquire into the jurisdiction of the tribunal which has exercised authority over the plaintiff; the nature of the offense with which he is charged; whether the indictment charges the offense of which he is convicted or one of lesser grade; and where the writ is issued after the prisoner has been bound over, the nature of the crime, the place of commission as alleged, the judgment rendered and all jurisdictional facts. But, as the hearing is not for the purpose of a trial of the plaintiff, the court will not weigh the evidence nicely on questions of fact. It will be

[1] Church on Habeas Corpus, sec. 124: According to the course of the common law, the method to compel a return to a *habeas corpus* was by first taking out an *alias habeas corpus* and then a *pluries*, and if no return was made to that, an attachment issued as of course. The court might also make a rule on the officer to return his writ, and if disobeyed the court might proceed against such disobedience in the same manner as they usually did against the disobedience of any other rule.

[2] In re Bogart, 2 Sawy. 400, 401; Ex parte Watkins, 7 Peters, 571; Ex parte Lange, 18 Wall. 165; Ex parte Yerger, 8 Wall. 94; Ex parte Parks, 93 U. S. 18; Ex parte Curtis, 106 id. 371; Ex parte Carll, id. 521; Ex parte Kenyon, 5 Dill. 387; Ex parte Shaffenburg, 4 Dill. 271; Ex parte Bridges, 2 Woods, 428; Ex parte Wallingford, 60 Cal. 103; Ex parte Snyder, 64 Mo. 59; Hamilton's Case, 51 Mich. 175; Cropper v. Com. 2 Rob. (Va.) 843; Exp. Co. v. Lynch, 65 Ga. 241.

[3] Church on Habeas Corpus, sec. 123: "The return to a *habeas corpus prima facie* imported verity, and other securities were provided for by law, and which were generally sufficient, against false returns. Watson's Case, 9 Ad. & El. 784; In re Hakewill, 22 Eng. L. & Eq. 399."

[4] Ex parte Coupland, 26 Tex. 386; Com. v. Chandler, 11 Mass. 83; United States v. Davis, 5 Cranch, C. C. 622; Tarble's Case, 13 Wall. 401; Ableman v. Booth, 21 How. 507; Com. v. Reed, 59 Pa. St. 426.

impossible in this work to go into all the numerous defects that may arise in the multitude of cases, but it is sufficient to say the court will more particularly inquire into the power of the tribunal committing plaintiff to try, hear, bind over and commit him. Such inquiries are jurisdictional.[1]

If on the face of the proceedings jurisdiction is shown, and its exercise rests in and is confided to the discretion of the tribunal or officer which has exercised it, it is a universal rule that the acts done by such officer or tribunal, jurisdiction existing over the subject-matter, will not be disturbed collaterally, but will be held to be properly done.[2] If, however, the judgment or order of commitment is harsh, excessive and unjust, the court may inquire into the facts and admit the plaintiff to bail in a proper case, and in some instances discharge him.[3]

§ 110. The three essential elements necessary to render conviction valid.— These are, that the court must have jurisdiction over the subject-matter, the person of the defendant, and authority to render the particular judgment. If either of these elements are lacking the judgment is fatally defective. Where these elements exist the judgment of the court is final and conclusive as against the world, and errors in ruling on motions, demurrers, the reception or exclusion of evidence, or in the determination of the facts by the jury, cannot be tried or reviewed by the writ of *habeas corpus*.[4] No court can ren-

[1] See § 103, p. 280, n. 2.

[2] See § 48 and notes.

[3] See § 98, note 1, p. 261.

[4] Church on Habeas Corpus, sec. 362: "To determine, however, when the court rendering the judgment has jurisdiction of the person, of the subject-matter, and to render the particular judgment assailed, is a question difficult of solution. The decisions of the courts are not uniform or harmonious on this point, but the later decisions of very high authority go to show that jurisdiction of the person and of the subject-matter are not conclusive; but that the jurisdiction of the court to render the particular judgment in question is a proper subject of inquiry. If any one of these three elements is lacking the judgment is fatally defective, and the prisoner held under it may be released on *habeas corpus*. People ex rel. Tweed v. Liscomb, 60 N. Y. 559; S. C. 11 Alb. L. J. 396; In the Matter of Petty, 22 Kan. 477; Ex parte Farnham, 3 Colo. 545; Ex parte Virginia, 100 U. S. 339; Kirby v. The State, 62 Ala. 51; Ex parte Simmons, id. 416; Ex parte Yerger, 8 Wall. 85; Ex parte Williams, 1 Wash. T. 240; Ex parte Gibson, 31 Cal. 619; Ex parte Smith, 2 Nev. 338; Ex parte Siebold, 100 U. S. 371; People ex rel. Davis v. Foster, 104 Ill. 156; People v. Cavanagh, 2 Park. Cr. 650; State of Louisiana v. Fenderson, 28 La. Ann. 82; Ex parte Hartman, 44 Cal. 32; Ex parte Parks, 93

der a more binding judgment, no court can look behind it. If it be a nullity the officer obeying it becomes liable for false imprisonment. The court in *habeas corpus* will not look beyond the judgment unless the record discloses some fact that destroys the jurisdiction under the law or that operates directly on the judgment itself.[1]

The prisoner may, however, show that he has committed no offense; not by traversing the facts, for the judgment is conclusive on that, but that there is no law punishing the act itself, or that the law is invalid, which is the same thing as no law, and there being no law punishing the act, it follows the court can impose no sentence.[2] So if the court has no jurisdiction over the person of the defendant, not having him properly before it, its judgment is void.

§ 111. The application for the writ.— The application for a writ of *habeas corpus* should be supported by the affidavit of the petitioner or some one in his behalf, and interested.[3] A wife may be heard in behalf of her husband, and by some of the statutes of the state the application may be filed by any one acting for the plaintiff or in his behalf.[4] The application will not lie by or in behalf of a person who has been conditionally pardoned by the governor and who has violated the

U. S. 18; Petition of Semler, 41 Wis. 517; S. C. 16 Alb. L. J. 119; Ex parte Scwartz, 2 Tex. App. 74; Ex parte McGill, 6 id. 498; Ex parte Boland, 11 id. 159; In re Truman, 44 Mo. 181; Ex parte Mess, 12 Pac. C. L. J. 279; Ex parte Lange, 18 Wall. 163; Ex parte Kearny, 55 Cal. 212; Ex parte J. C. H. 17 Fla. 368; Ex parte Bulger, 60 Cal. 438; Miller v. Snyder, 6 Ind. 1; Petition of Crandall, 34 Wis. 177; Smith's Application, 2 Nev. 338."

[1] See above note.

[2] See § 98 and notes.

[3] Hawes on Jurisdiction, sec. 181: "Application for the writ should be supported by affidavit either of the party himself, or if he be so coerced as to be unable to furnish it, by some other person. A wife may be heard on behalf of her husband, a sister, of an orphan child under fourteen years of age, the former being denied access to her; but a stranger who is a mere volunteer it seems has no such right. . . . A full, unconditional pardon is irrevocable; and where a person on sentence for felony seeks a discharge on *habeas corpus*, based on such pardon, it may not be impeached; but a conditional pardon does not become operative until the performance of the condition. If, therefore, the instrument is received by the prisoner in bad faith and with no intention of performing the conditions, it becomes inoperative and will not entitle the petitioner to a discharge upon this writ."

[4] See note above.

terms of the pardon.[1] The petitioner should always state sufficient facts to show a *prima facie* case in his favor; and if it appears from the petition that there are not sufficient grounds for his release, or if facts are disclosed showing that he is

[1] Arthur v. Craig, 48 Iowa, 267: "'A pardon may also be conditional, that is, the king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition, either subsequent or precedent, on the performance whereof the validity of the pardon will depend, and this is by the common law.' This rule has been followed by adjudications in England, and has been so generally adopted by the courts of this country, under constitutions providing an unrestricted pardoning power, that the law must now be regarded as settled that the executive may annex to a pardon any condition, precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. People v. Potter, 1 Parker, 47; 1 Bishop, Cr. L. secs. 711, 712; United States v. Wilson, 7 Peters, 150; Ex parte Wells, 18 How. 307; Flavell's Case, 8 Watts & Sargeant, 197; State v. Smith, 1 Bailey (S. C.), 283. The remaining question in the case is as to the effect to be given to a conditional pardon. In State v. Smith it is said: 'A pardon *ex vi termini* presupposes a wrong done, or an offense committed, and forgiveness of the offender by the party injured; and as the act of pardoning must necessarily be voluntary, the injured party must have the power of prescribing the atonement to be made, and it necessarily follows that the offender has the right to accept or not to accept the terms proposed. He may prefer to make the reparation demanded by the law for the wrong done or offense committed, or the atonement substituted, at his election.' The petitioner in this case was serving a sentence imposed by the law for a crime committed. He had no legal right to demand a release from imprisonment. The pardon offered to him was an act of grace or favor upon the part of the state by its executive. He was free to accept the pardon, with its conditions, or to reject it, and serve out his sentence. He chose the former, accepted the pardon and stipulated that for a violation of the conditions the instrument might be summarily revoked by the governor, and he should be remanded to the penitentiary for the remainder of the term of his sentence." McKay v. Woodruff, 77 Iowa, 415: "It appears that, before the arrest complained of, entries were made upon the record of each of these judgments, showing them satisfied. These satisfactions were by J. A. Donnell, district attorney, 'and in consideration of the sum of one hundred and seventy-five dollars in hand paid by Bolton & McCoy, attorneys for A. McKay, and by virtue of authority given by the board of supervisors of Mahaska county, Iowa.' Section 16, article 4, constitution of Iowa, and section 4712, Code, vest the power to grant reprieves, commutations and pardons, and to remit fines and forfeitures, solely in the governor of the state. Neither the district attorney nor board of supervisors has any authority to remit fines. The fact that the compromise made was desirable, because of a prior mortgage on appellant's real estate, did not confer authority on the district attorney or board of supervisors to remit any part of the

rightfully held, the writ will be refused.[1] The place where the petitioner is confined should be shown.[2] A denial of the petition is not a bar to a second writ; but in some states the petitioner must show whether the question has been passed upon by any of the courts.[3] The doctrine of *res adjudicata* has no application to this proceeding except where the statute provides for an appeal, which is the case in some states.[4] A

fines. Such a fact might well be addressed to the executive. It is claimed that, as these judgments were satisfied of record, appellant was not amenable to arrest until the satisfactions were set aside. The records show upon their face that the satisfactions were without authority, that they were absolutely void; hence they were no bar to further proceedings to enforce the judgments. O. M. Kohn held appellant's note for about six hundred dollars secured by mortgage on part of a certain lot, which mortgage was superior to the judgments under notice. On May 20, 1886, the governor granted a commutation to appellant in these words: 'Now, therefore, I, William Larrabee, governor of the state of Iowa, do hereby commute said judgments, so far as to release said above described property from the liens occasioned by said judgments, but in no manner to relieve said A. McKay from his personal liability in the premises. This commutation is granted upon the condition that said McKay shall pay all costs assessed against him in said cases, and upon his giving a pledge to forever refrain from engaging in the saloon business in Iowa in violation of the law.' Clearly, this commutation was limited to the release of the property, and in no manner relieves appellant from his personal liability. If it did, it does not appear that McKay has complied with the condition upon which the commutation was granted."

[1] See note 1, p. 296.

[2] Locality of confinement should be stated in petition. People v. Cowles, 59 How. Pr. 287.

[3] Hawes on Jurisdiction, sec. 181: "A decision under one writ of *habeas corpus* refusing to discharge a person restrained of his liberty is no bar to a second writ by another court or officer. In re Perkins, 2 Cal. 424; Ex parte Ellis, 11 Cal. 223, 225; Matter of Ring, 28 Cal. 251; Yates v. People, 6 Johns. 416; In re Snell, 31 Minn. 110; Bell v. State, 4 Gill, 303; Ex parte Kaine, 3 Blatchf. 2, 5; Bonnett v. Bonnett, 61 Iowa, 200; Ex parte Foster, 5 Tex. App. 643; Ex parte Robinson, 6 McLean, 356; Ex parte Campbell, 20 Ala. 93; Ex parte Lawrence, 5 Binn. 304; People v. Brady, 56 N. Y. 185. A decision on *habeas corpus* is not appealable or subject to review; the doctrine of *res adjudicata* has no application to such a case, but it seems that a discharge under a writ of *habeas corpus* by a court of competent jurisdiction, being in favor of personal liberty, is final and conclusive, and a re-arrest under the same charge is unlawful. McFarland v. Johnson, 27 Tex. 105; Matter of Ring, *supra;* Lea v. White, 4 Sneed, 73; People v. Fancher, 1 Hun, 28; In re Curley, 34 Iowa, 185; Hammond v. People, 32 Ill. 453; Ex parte Thompson, 93 Ill. 89; In re Blair, 4 Wis. 526; Perry v. McLendon, 62 Ga. 601; Ex parte Pattison, 56 Miss. 162; Weddington v. Sloan, 15 B. Mon. 152."

[4] See last note.

discharge of a person under the writ by a lawful court is final and conclusive, and a re-arrest of the petitioner under the same charge cannot be made.[1]

§ 112. Practice under the writ.— As this work is not designed to cover practice, we will confine our remarks on this subject to jurisdictional questions alone. The return to the writ *prima facie* imports verity.[2] While it has been held that a demurrer will lie to the petition, the proper way to raise the question of its sufficiency is by a motion to quash the writ or by exceptions to it.[3] On a motion to discharge the petitioner after the return is made, the sufficiency of the return is the only matter to be examined by the court.

The questions of fact which arise in this proceeding are triable by the court, as the vital issue is the right of the plaintiff to his personal liberty.[4] The only questions involved are the validity of the process on its face and the jurisdiction of the court to issue it; for if the court had power to try the plaintiff and render the judgment it did render the inquiry ends; the jurisdiction does not depend on the merits of the cause: they are passed on by the court which tried the petitioner.[5]

[1] Ex parte Jilz, 64 Mo. 208; Com. v. McBride, 2 Brewst. 545; Wyeth v. Richardson, 10 Gray, 240; In re Clasby, 1 West. C. Rep. 524; Dodge's Case, 6 Mart. (La.) 570; State v. Buckham, 29 Minn. 462; Ex parte City Council, Re Knox, 64 Ala. 463.

[2] Watson's Case, 9 Ad. & El. 731.

[3] In re Hakewill, 22 Eng. Law & Eq. 399; Church on Habeas Corpus, sec. 122.

[4] Church on Hapeas Corpus, sec. 170: "The prisoner may raise an issue of fact on the return by a clear and definite statement, in the form of a reply to the return, of any fact which he relies upon to show the illegality of his imprisonment. In the Matter of Ferrens, 3 Ben. 442. An issue of fact may also be formed upon the return by a denial of its averments, or by alleging new facts legally admissible, to avoid the effect of such averments. Speer v. Davis, 38 Ind. 271; Leary's Case, 6 Abb. N. C. 43; United States v. Williamson, 3 Am. Law Reg. 729; Roth v. House of Refuge, 31 Md. 329."

[5] Lord Chief Justice Wilmot said, page 94 of his Opinions: "The writ is not framed or adapted to litigating fact; it is a summary, short way of taking the opinion of the court upon a matter of law. Where the facts are disclosed and admitted, it puts the case exactly in the same situation as if an action of false imprisonment had been brought, and the defendant had set forth a series of facts to justify the imprisonment, and the plaintiff had demurred to the plea. A return is the same as the justification demurred to; but in both cases, if the facts are controverted, they must go to a jury; and when the return to a *habeas corpus* is made and filed, there is an end of the whole proceeding, and the parties have 'no day' in

As before remarked, irregularity in the trial does not enter into the hearing under this writ, for the judgment must, in order that the plaintiff shall be discharged because of illegality, become a nullity.[1]

If it appears that the plaintiff is in custody under a law of the United States, and has been duly sentenced by a federal court, a state court cannot discharge him.[2] But if it is shown by the return made to a federal court, that he is in the custody of a state by order of a state court for an act done in pursuance of a law of the United States, or the order of a court thereof, the writ will issue, and in a proper case the petitioner will be discharged.[3]

court, and therefore it is impossible that a proceeding by way of trial should be grafted upon it. . . . There is no difference between facts in a return and any other facts averred upon record."

[1] Church on Habeas Corpus, sec. 848: "This has been quoted by many judges, both English and American, in laying down the general rule that the writ of *habeas corpus* cannot reach such errors or irregularities as will render a judgment voidable only, but only such illegalities as render it void. Ex parte Scwartz, 2 Tex. App. 74; Ex parte McGill, 6 id. 498, and cases cited; Ex parte Sam, 51 Ala. 34; Ex parte Winston, 9 Nev. 71; Ex parte Hubbard, 65 Ala. 473; Ex parte Brown, 63 id. 187; Darrah v. Westerlage, 44 Tex. 388. . . . 'Illegality can be affirmed only of radical defects, and signifies that which is contrary to the principles of law as distinguished from rules of procedure. Illegality denotes a complete defect in the proceedings.' Ex parte Gibson, 31 Cal. 619, citing Hurd on Habeas Corpus (1st ed.), 333."

[2] Church on Habeas Corpus, sec. 228: "The federal courts determine the question of their own jurisdiction and no state court can make any inquiry into it. After the return to a writ of *habeas corpus* is made, and the state court or judge is judicially apprised that the party is in custody under the authority of the United States, they can go no further. But the federal courts will inquire into the jurisdiction or power of a state court to sentence a party, or to commit him to prison, under an act of the legislature creating or attempting to create the offense for which the prisoner is convicted, and for which he is held in custody, and which is in violation of any provision of the constitution of the United States, a law thereof, or the provisions of a valid treaty. In such cases the defect is not mere error or irregularity, it is not a mere wrongful exercise of jurisdiction, but it is defective in substance. The state court has no power or jurisdiction in the premises, for the prisoner is in custody in violation of a treaty of the United States, or a law or the constitution thereof. Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; In re Wong Yung Qui, 9 Rep. 366; S. C. 2 F. R. 624."

[3] Ex parte Bridges, 2 Woods, 428; Ex parte Reed, 100 U. S. 13; Church on Habeas Corpus, sec. 69, note, p. 67: "But the general doctrine which now seems to be estab-

If the judgment under which the plaintiff was convicted was duly entered and the court trying the case had jurisdiction to render it, and it was duly rendered, all inquiry is ended, for the writ is not intended to review the errors of the trial court. Then the rule is that an imprisonment under a judgment cannot be unlawful, unless the judgment be void or a nullity.

§ 113. Certiorari in aid of.— The use of the writ of *certiorari* auxiliary to the writ of *habeas corpus*, as a means of rendering the jurisdiction of the courts under the writ the more effective, is very common in *habeas corpus* proceedings.[1] Under the fourteenth section of the judiciary act of 1789 the authority of the supreme court of the United States to issue the writ of *habeas corpus*, accompanied by the writ of *certiorari*, to bring before the court the proceedings of a circuit court, under which the petitioner is restrained of his liberty, and to examine into the proceedings for the purpose of determining whether the court had exceeded its powers, is no longer an open question, and such writ of *certiorari* has been issued to

lished by the recent decisions of the supreme court is, that if a party is imprisoned under the authority or the color of the authority of the United States, the supreme court may by writ of *habeas corpus* inquire into the lawfulness of that imprisonment, and afford relief if such imprisonment be without due legal authority. Ex parte Yerger, 8 Wall. 85. No court of the United States or judge thereof can issue a writ of *habeas corpus* to bring up a prisoner who is in custody under sentence or execution of a state court for any other purpose than to use him as a witness, whether the imprisonment be under civil or criminal process. Ex parte Dorr, 3 How. 103. One under sentence of death cannot accept a pardon upon condition of suffering imprisonment for life, and afterwards on *habeas corpus* claim the pardon to be absolute and the condition void, and plead constraint of duress of imprisonment and duress *per minas* in subscribing an acceptance of the pardon with the condition annexed. In cases where the inferior court has jurisdiction, the supreme court will not review the proceedings on *habeas corpus*. Neither will the decision by a district court or circuit court that a fact is a crime be reviewed by the supreme court on *habeas corpus*."

[1] *Certiorari* has always been considered as ancillary to that of *habeas corpus*, and has long been used as an aid and means of rendering the jurisdiction effective. Church on Habeas Corpus, sec. 260, note 4; Ex parte Hamilton, 3 Dall. 17; Ex parte Burford, 3 Cranch, 448; Ex parte Jackson, 96 U. S. 727; Ex parte Bennett, 2 Cranch, C. C. 612; Ex parte Siebold, 100 U. S. 371; Ex parte Bollman and Swartwout, 4 Cranch, 100; In re Martin, 5 Blatchf. 303; Ableman v. Booth, 21 How. 506.

the United States district court.[1] So the writ of *certiorari* has been used in aid of *habeas corpus* to review the decision of United States commissioners, where proper.[2]

If the writ of *habeas corpus* issued as a common-law writ, and the return to it showed that the petitioner was held by virtue of proceedings in a court, or before a magistrate over whom the court has a supervisory authority, the court issuing the former writ may issue the writ of *certiorari* to bring up the record, and may therefore hear and decide the case or review and correct the proceedings in order to give efficacy to the writ of *habeas corpus*. The evidence is, however, not usually reviewed.[3] The court may in some states, and perhaps in all, review the evidence where the plaintiff was committed on preliminary hearing; but the usual inquiry is made to the law questions, such as whether a statutory crime or a common-law crime was set forth, or if any offense is shown by the evidence.

§ 114. Generally — Facts not reviewed by.— The writ of *habeas corpus* is not therefore in its nature one that is intended to review the facts already tried or intrusted for trial to a tribunal that by statute is authorized to hear, try and determine a case, but it is rather a legal proceeding to test the legality of the trial, and in this respect the power of the court is reviewed, down to the moment of and including the entering of the judgment. The law giving the power is under review, also the law under which the petitioner for the writ is convicted, the legality of the trial, and every subject going to the making up of the jurisdiction, and particularly the judgment itself. It does not act as a writ of error but of right, and its high functions are to see that the law is maintained. It is not to destroy the law but to fulfill its requirements; and the question which is considered is, in the main, whether the applicant for the writ, the plaintiff, is unlawfully, or rather illegally, restrained of his liberty without due process of law. It is a law test and trial, not one of fact.[4]

[1] Notes on Revised Statutes of United States, 261, 262; also *ante*, § 98.

[2] See last note; also Ex parte Barnes, 1 Sprague, 133.

[3] Roberts v. Reilly, 116 U. S. 80; Ex parte Alexander, 14 F. R. 680; Ex parte Peters, 12 F. R. 461.

[4] Notes on R. S. of U. S. 222, 223: The writ will issue where one has been convicted by a state court of

passing counterfeit national bank bills and has been imprisoned therefor. Ex parte Houghton, 7 F. R. 657. If a person is imprisoned by virtue of a conviction under a state law which is in conflict with either the constitution or a law or treaty of the United States, he may be discharged by the circuit court. Re Brosnahan, 18 F. R. 62; Re Wong Yung Quy, 6 Sawy. 237. One who is imprisoned under a valid law, by a judicial officer who holds by color of right and is an officer *de facto*, is not imprisoned without due process of law and cannot be released. Re Ah Lee, 5 F. R. 899. If a petitioner is held, according to the judgment of a commissioner, for an offense against the laws of the United States upon any competent evidence, he is not held contrary to law. Re Byron, 18 F. R. 722; Re Stupp, 12 Blatch. 501; Re Macdonnell, 11 id. 79; Re Wahl, 15 id. 384; Re Fowler, 4 F. R. 303; United States v. Johns, 4 Dall. 412. *Contra*, Re Henrich, 5 Blatch. 414. A commissioner of a United States court has no authority to punish for contempt, and a person committed by him for that offense will be discharged. Ex parte Perkins, 29 F. R. 900. A person held under a void warrant is held contrary to law. Re Farez, 7 Blatch. 345. If a conviction has been had under a valid state statute, the validity of the commitment is not affected because of an unconstitutional amendment to the statute which did not repeal the original act. Ex parte Davis, 21 F. R. 396. The sentence of a court-martial, organized under state laws, rendered against a member of the militia without notice is void. It is in contravention of this clause for the state authorities to arrest a person accused of crime committed in a place where the United States has exclusive jurisdiction under Revised Statutes, section 711. State courts have no jurisdiction of the crime of perjury committed in a judicial investigation held under authority of a statute of the United States. Ex parte Bridges, 2 Woods, 428. A person imprisoned for an infamous crime without having been presented or indicted by a grand jury according to the fifth amendment is entitled to a discharge. Ex parte Wilson, 114 U. S. 417. . . . Where, under an indictment containing four counts and alleging two distinct offenses of a like character, the petitioner was sentenced, after a general plea of guilty, to two years' imprisonment under each count, each term to begin at the close of the preceding term, and application was made for a release at the expiration of two years, it was held that, as against this collateral attack, the judgment was good for at least four years' imprisonment. Re Peters, 4 Dill. 169. Where it is shown that a prisoner is held under an extradition warrant which recites that it was issued upon the requisition of a governor of another state, and a copy of an indictment for burglary accompanies the warrant, the latter is conclusive evidence that the person named is charged with crime in the state whence the requisition issued according to the constitution and statutes of the United States. If no indictment has been found against one who has been held to await the action of the grand jury, on the discharge of the latter he is entitled to be released, and the question of probable cause for holding him in the first instance will not be inquired into. Re Esselborn, 8 F. R. 904. If the indictment under which one is held to await trial is not clearly good the prisoner will be discharged. Re Buell, 3 Dill. 116. The Cherokee na-

tion is neither a state nor a territory within the meaning of the constitution and laws, and a person held under the warrant of a governor of a state upon a requisition issued by the chief of that nation is entitled to be released. Ex parte Morgan, 20 F. R. 298. A person indicted for a felony in one state, forcibly abducted from another state and brought to the state where he was indicted by parties acting without warrant or authority of law, is not entitled, under the constitution or laws of the United States, to release from detention under the indictment by reason of such forcible and unlawful abduction. Mahon v. Justice, 127 U. S. 700. No right is established under the constitution, laws or treaties where it appears that the petitioner was kidnaped in a foreign country and taken thence by force to the state whose law he had violated, no regard being had to an existing extradition treaty. Ker v. Illinois, 119 U. S. 436."

CHAPTER XII.

JURISDICTION IN CONTEMPT.

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§ 115. Contempts — Definition — Nature of.— A contempt is a wilful disrespect or insult offered to a court, or a wilful disregard of the authority of a court. There are two classes of contempts: 1. A direct or criminal contempt, which is com-

mitted by openly insulting or exhibiting disrespect to the court in its presence, or by openly resisting its power, or the power of the judge or judges presiding over it. 2. Constructive or consequential contempts, which consist of any act or omission of duty, whereby it plainly appears the offender intended to disregard the order, authority or mandate of the court, and create disrespect for its authority.

Some contempts are *in facie curiæ*, and consist of open misbehavior by the use of insulting language, rude and contumelious conduct, obstinacy, perverseness, prevarication, or breach of peace; others, by the disobedience of a rule or order of the court or its process, preventing the execution of a writ for the gratification of private malice, extortion, injustice or oppression; speaking or writing contemptuously of the court, or its judge or judges acting in a judicial capacity; printing false accounts of the proceedings (or even true ones against the order of the court) concerning causes pending, forcibly rescuing prisoners, or doing anything that indicates a gross want of respect for the court itself.

So, too, an inferior magistrate may be guilty of contempt of court by acting unjustly and oppressively in the administration of justice; by disobeying writs issued by superior courts, as by proceeding in a cause after he has been commanded to stop, or the cause is removed by writ of *certiorari*, of error or writ of prohibition, or the proceedings suspended by *supersedeas*.

Contempts may be committed by sheriffs, bailiffs and jailors, or minor officers of the court, by abusing its process, or by deceiving parties; by acts of oppression, extortion, culpable neglect or misbehavior. These may be committed by attorneys, jurymen or witnesses, by disobeying process, making default when summoned, refusing to be sworn, and like courses. And by a party by disobedience of orders and judgments that he can obey by refusing, through obstinacy, or purposely, obedience to writs of injunction or prohibition. The further naming of acts which amount to a contempt seems unnecessary.

§ 115a. By what power the court punishes.— The power to punish for contempts is inherent in all courts. Its existence is essential for the preservation of order in judicial pro-

ceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and vested with jurisdiction over any subject they became possessed with this power. The power of the United States courts is to punish by fine and imprisonment at their discretion, and the jurisdiction is confined to the punishments named, and extends to no others.[1]

To constitute contempt of a judicial tribunal the court must be exercising power or be engaged in some judicial proceeding; if it is not so engaged it is not exercising the functions of a court; or the act done must be in disobedience of an order the court had power to make. Therefore, where the record in a *habeas corpus* proceeding showed that a plaintiff had been held for contempt in refusing to give an affidavit desired for information, and not for use in court, the order was without jurisdiction and void, and the prisoner was released.

[1] Anderson's Law Dict. pp. 242, 243: "To the head of summary proceedings is referred the method immemorially used by the superior courts of punishing contempts by attachments. . . . Contempts are either direct (sometimes called criminal), which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else are consequential (sometimes called constructive), which, without such gross insolence or direct opposition, plainly tend to create a universal disregard of their authority. . . . Such has always been the power of the courts, both of common law and of equity. The exercise of the power has a twofold object: to punish disrespect to the court or its order, and to compel performance of some act or duty. In the former case, the court must judge for itself of the nature and extent of the punishment. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act or shows that it is not in his power to do it. Re Chiles, 22 Wall. 168; Ex parte Hollis, 59 Cal. 408. See articles in 22 Cent. L. J. 464–66; 33 Alb. L. J. 145. . . . The act of congress, March 2, 1831, 'declaratory of the law concerning contempts of court,' limits the power of the circuit and district courts to three classes of cases: 1, where there has been misbehavior of a person in the presence of a court or so near thereto as to obstruct the administration of justice; 2, where there has been misbehavior of any officer of a court in his official transactions; 3, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of court. Ex parte Robinson, 19 Wall. 510, 511; Fischer v. Hayes, 19 Blatch. 13–18; Worden v. Searls, 121 U. S. 14, 26."

To constitute a direct contempt of court there must be some disobedience of its order or judgment, or intended disrespect to the court or its officers in presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings or with the administration of justice.[1]

To constitute a constructive or consequential contempt of court some act must be done, not in presence of the court or judge, that tends to obstruct the proper administration of justice, or bring the court or judges or the administration of justice into disrespect.[2]

[1] Dudley v. McCord, 65 Iowa, 673: "It was held in Robb v. McDonald, 29 Iowa, 330, and State v. Seaton, 61 Iowa, 563, that the justice might punish for contempt for a refusal to give an affidavit when subpœnaed, under the sections above cited [secs. 3692, 3693, Iowa Code], and that it was not competent for the person subpœnaed to set up that no legal use could have been made of the affidavit if it had been given. The ground upon which those decisions are based is that the justice has jurisdiction to pass upon the question as to whether the object for which the affidavit is sought is legal, and, if he judges it to be such, it is not for the witness to set up his judgment to the contrary, and refuse to obey the subpœna upon that ground. It is to be observed, however, that the decision in each of these cases was made by a divided court. It is to be observed further that in each there was an action pending, and the affidavit was sought for use in the action. Affidavits from these plaintiffs were not sought for use in an action, nor were they sought for any use for which there is any provision of law. They were sought for the mere purpose of information."

[2] In re Dill, 49 Am. Rep. 505; S. C. 32 Kan. 668: "Do the facts found by the court and embodied in the judgment constitute a contempt of court? The substance of the charge and facts found is that the petitioner was under a recognizance to appear in court for trial upon criminal charges pending against him therein, that he did not appear during the term to which he was recognized, and absented himself from the county and kept himself so that he could not be found by the officers of the court, intending thereby to obstruct the court in proceeding with his trial. To constitute a direct contempt of court there must be some disobedience to its order, judgment or process, or some open and intended disrespect to the court or its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings, or with the administration of justice. To constitute a constructive contempt of court, some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice, or bring the court or judge, or the administration of justice, into disrespect. The petitioner violated no order, direction or judgment of the court, nor was he at large by direction or order of the court. He had entered into a recognizance, as the statute permitted him to do, by which he bound himself to the state to appear in court at the

The proceeding to punish for contempt is in its nature a criminal and not a civil action; and is incidental to and largely independent of the suit, action or proceeding in the course of which the offense was committed.[1] The action should be en-

time and term of the court stated in the recognizance, and submit to a trial of the charges therein pending against him. He did not appear in the court as required by the recognizance, and absented himself from the county in which the court was held. The extent of his offending was in not appearing in court and submitting to the trial as he had bound himself to do by the recognizance, and in absenting himself from the county where the court was held. . . . The only penalty imposed by law on the petitioner for his non-appearance, pursuant to the terms of the recognizance, was the forfeiture and prosecution of the recognizance. We think that his non-appearance in court during the term for which he was recognized to appear, and his absenting himself from the county, were not a contempt of court, and that the charge against him on which he was convicted and is now imprisoned did and does not constitute such an offense as renders him liable to punishment beyond the punishment provided by the statute; and as there was no offense there could be no lawful conviction, and the court had no jurisdiction to render any legal judgment, and the judgment rendered is void, and the imprisonment of the petitioner under it is unlawful. . . . The petitioner could have taken proceedings in error in this court, and thereby relieved himself from this void judgment and illegal imprisonment, but that is not his only remedy; the proceedings by *habeas corpus* are proper, and he is entitled to be discharged from imprisonment under them. See 13 Md. 634 (App.), for cases." Watson v. Williams, 36 Miss. 331; State v. Matthews, 37 N. H. 451; Ingle v. State, 8 Blackf. 574; In re Yates, 4 Johns. 334.

[1] New Orleans v. Steamship Co. 20 Wall. 392: "The fine of $300 imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. Crosby's Case, 8 Wilson, 188; Williamson's Case, 26 Pa. St. 24; Ex parte Kearney, 7 Wheaton, 41. This court can take cognizance of a criminal case only upon a certificate of division in opinion. In Crosby's Case, Mr. Justice Blackstone said: 'The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interfering to each respective court.' The circuit court, having first acquired possession of the original case, was entitled to hold it exclusively until the case was finally disposed of. Taylor v. Taintor, 16 Wall. 370; Hagan v. Lucas, 10 Pet. 400; Taylor v. Carryl, 20 How. 583. Any relief to which the city was entitled should have been sought there, and that court was competent to give it, either in the original or in an auxiliary case. As to any other court the matter was *ultra vires*. It was unnecessary, unwarranted in law, and grossly disrespectful to the circuit court to invoke the interposition of the state court as to anything within the scope of the litigation already pending in the federal court."

titled as a state case. In the federal courts the United States is a party. In the state courts the cause should be entitled as a state case, and is triable on information or indictment.[1] The usual proceeding, when the contempt is consummated in presence of the court, is for the court to direct the arrest of the offender by one of its officers. The offender, if the offense is not a grievous one, is permitted to purge himself of the contempt, when done in haste and in a moment of anger, by an apology that is received in mitigation of sentence, or sometimes in satisfaction.[2] Each court, in the absence of statutory rules, is the sole judge and final arbiter of the proceedings to punish for contempt.[3]

Ex parte Crittenden, 7 Pac. L. J. 483; S. C. 62 Cal. 534; Fischer v. Hayes, 6 F. R. 63; Worden v. Searls, 121 U. S. 26; Re Crosby, 2 W. Black. 756; Ex parte Kearney, *supra*.

[1] Re Ellerbe, 4 McCrary, 449; United States v. Berry, 24 F. R. 783; United States v. R. Co. 16 F. R. 853; Hendryx v. Fitzpatrick, 19 F. R. 812.

[2] Hawes on Jurisdiction, sec. 221: "The authority to deal with an offender in a matter of contempt belongs exclusively to the court in which the offense was committed, and no other court, not even the highest, can interfere with its exercise. Williamson's Case, 26 Pa. St. 9; S. C. 67 Am. Dec. 374; Ex parte Summers, 5 Ired. 151; In re Fernandez, 10 Com. B. (N. S.) 26." Androscoggin R. R. Co. v. Androscoggin R. R. Co. 49 Me. 400: "There are two kinds of contempt recognized by the authorities and by the practice of the courts. Criminal contempts are those committed in the immediate view and presence of the court, such as insulting language, or acts of violence, which interrupt the regular proceedings in courts. This class of contempts may and should be punished summarily, and by the order of the presiding judge, or the court, after such hearing, at once, as the court may deem just and necessary. There is another class of contempts, which are in a sense constructive, and arise from matters not transpiring in court, but in reference to failures to comply with the orders and decrees issued by the court, and to be performed elsewhere. Such refusals or failures are undoubtedly contempts, as actual as those committed in open court, and liable to be punished under the same law. But the process to bring parties into court, and the time given for a hearing by our rules, are different from the summary process in case of a criminal contempt before the court."

[3] In the absence of any statutory limitations or restrictions, the power of courts over contempt is omnipotent, and its exercise is not to be inquired into by any other tribunal. Midlebrook v. State, 43 Conn. 266; Morrison v. McDonald, 21 Me. 554; Ex parte Smith, 28 Ind. 47; Ex parte Adams, 25 Miss. 883; Ex parte Edwards, 11 Fla. 183; In re Cooper, 32 Vt. 255; State v. Matthews, 37 N. H. 453; Little v. State, 90 Ind. 338; Clark v. People, Breese (Ill.), 340; S. C. 12 Am. Dec. 177; State v. Woodfin, 5 Ired. 200.

The practice is, when the contempt is one committed in the presence of the court, to cause the offender to be brought before it. The case is then docketed against him, and a record is made of the act done which constitutes the contempt. The defendant is permitted to be represented by counsel or heard in person, and the punishment imposed is entered in the form of a judgment.

§ 116. Answer and return.— The manner in which the act was done should appear of record. When it is requested, the court should present a written explanation, to be filed by the accused.[1] If the contempt was not committed in presence of the court, a showing of the facts should be made and filed setting forth the act of omission or commission constituting the contempt and its nature. The usual practice is for the court to issue an attachment for the accused, and sometimes a rule requiring him to show cause why an attachment should not issue.[2] The proceedings are conducted, as to giving time to the

[1] Androscoggin & K. R. R. Co. v. Androscoggin, etc. R. R. Co. 49 Me. 400. See *ante*, § 115*a*, n. 2, p. 309.

[2] Ex parte Cottrell, 59 Cal. 421: "In the case now before us it is alleged in the petition, and not denied in the return, that the order which the petitioner is charged with having disobeyed was not served upon him, nor was any demand made upon him to comply with it, before he was attached, and he claims that for this reason the court had not jurisdiction to proceed in the matter, and that the proceedings had were without, or in excess of, its jurisdiction. Conceding that this is a special proceeding under the code, it cannot fairly be claimed that the court, in order to acquire jurisdiction, was bound to take any other steps than those prescribed by the code, and the code makes 'disobedience of any lawful judgment, order or process of the court' a contempt of its authority, and provides in what manner a person guilty of such disobedience may be proceeded against. It does not make a service of the judgment or order disobeyed, or a demand upon the person who was bound to obey it, to do so, a condition precedent to the issuing of an attachment against him for disobeying it. . . . Upon the same principle we cannot discharge the petitioner on the ground that he testified to his inability to comply with the order he is charged with having disobeyed. If he could not obey it, he should not be punished for not obeying it. But the question whether it was in his power to obey it was one of fact, which the court making the order had to determine, and we are not aware of any law which makes the statement of a party under oath that he is unable to comply with such an order absolutely conclusive. The court may, nevertheless, have good and sufficient reasons for disbelieving his statement. In this case we could not determine that question without reviewing all the evidence introduced upon the hearing before the superior court, and that we are not authorized to do in this proceeding. In Ex parte

accused to answer, show excuse, and prepare for the hearing, as ordinary summons proceedings. The defendant may show there was no contempt by proof that it was impossible to perform the act or obey the order.[3]

Cohen, 6 Cal. 318, the order of commitment did not contain a recital that it was in the power of Cohen to have complied with the order which he had disobeyed. The order of commitment in this case does recite that it was in the power of the petitioner to have obeyed the order which he had disobeyed. Without reviewing the evidence we could not determine whether that recital is true or not, and, as before stated, we cannot review the evidence. . . . But the writ of *habeas corpus* was not framed to retry issues of fact, or to review the proceedings of a legal trial. Ex parte Bird, 19 Cal. 130. The petitioner in this case has been tried upon a charge of contempt, and found guilty by a court of competent jurisdiction. It is quite clear that we cannot, in this proceeding, review the findings of that court upon the question of his disobedience of its order, or of his ability to comply with that order." In the Matter of Smethurst, 2 Sandf. (N. Y.) 724: Under the statute of New York set out in the opinion, "a judge, upon due proof, may, in his discretion, issue an attachment in the first instance against the party accused, to appear and answer, or he may grant an order to show cause. In either case, copies of the affidavits upon which the application is founded should be served with the attachment or order. It is not necessary that the party accused should first have an opportunity of being heard upon an order to show cause before an attachment can issue. The attachment is not issued, in such instances, for the purposes of punishment, after a final adjudication. It is only a mode of bringing the party before the court." Smith v. McLendon, 59 Ga. 523. If a party can clear himself on oath he may do so and be discharged. Elderton's Case, 6 Mod. 73.

[3] Ex parte Maulsby, 13 Md. (Appendix) 641: The commitment was "until he purge the contempt, by appearing before the grand jury," etc. "But," said Judge Bartol, "it appears that the grand jury has been discharged, so that it has become impossible for him to obey the court's process; and the question arises whether by reason of that fact he is entitled to be discharged, or, in other words, whether the term of imprisonment as fixed by the warrant is ended. This point was not presented in the argument, but it seems to me upon the best reasons which I am able to apply to the subject, and by the analogies of the law, that on this ground it is my duty to discharge the petitioner. It is always competent to inquire whether anything has arisen since the commitment to put an end to the imprisonment, as a pardon, or an expiration of the term fixed by the commitment. . . . There is no doubt of the power of the court to commit until the party answer or testify, or produce papers before a grand jury. In such a case the commitment is a compulsory process to compel the party to obey the mandate of the court. But if, by an event subsequently happening, as by the adjournment of the court, and the discharge of the grand jury, it becomes impossible for him to obey the court's process, it must result from necessity that the term of imprisonment imposed is ended, and

The defendant cannot call in question the order itself or its correctness, if the court had jurisdiction to make the order. The inquiry is: Was the court empowered to make the order; did it make the order, and was obedience possible; for if obedience was impossible, and the contempt consisted of non-performance, not the result of the defendant's acts wilfully done, then the order itself was improvident.[1]

that the party is entitled to be discharged, otherwise the imprisonment would be perpetual. . . . In this case, the duration of the imprisonment must be determined by the terms of the commitment, and its legal operation and effect. It is until he purge the contempt by appearing before the grand jury and producing the papers to them. How can that be done after the grand jury has been discharged? It has become impossible, although the petitioner should be ready and willing to do so. If, in an ordinary case, a witness, failing to recognize, be committed to the custody of the sheriff, for the purpose of testifying to the grand jury, when the grand jury is finally discharged he is entitled to be released, and in my opinion the same principle applies to this case. The term of imprisonment fixed by the warrant is ended by operation of law; not because the court has not the power to commit for contempt for a period extending beyond the term of the court, but because in this case it has not done so. This point may not, perhaps, be free from doubt, but, if that be conceded, it is my duty to cast whatever doubt may exist in favor of the liberty of the citizen." People v. Cassels, 5 Hill, 164; People ex rel. Watters v. Conner, 15 Abb. Pr. (N. S.) 430.

[1] Hendryx v. Fitzpatrick, 19 F. R. 810; United States v. Sowles, 16 F. R. 536; United States v. Atcheson R. Co. 16 F. R. 853; In Matter of Watson, 3 Lans. 408; Ex parte Perkins, 18 Cal. 60. Church on Habeas Corpus, 430: "In New York it has been held that where a party has been committed for contempt by the rule of a court of record, if it is such a rule as the court could legally make under any circumstances, all jurisdictional steps and matters of regularity are to be presumed; and it seems that even on *certiorari* to remove a summary conviction by an inferior court the superior court will intend the proper notice to acquire jurisdiction. But in Vermont, while the supreme court thought they could not re-examine the adjudication of contempt of a court of competent jurisdiction, where a chancellor committed one for contempt — upon the showing of the adverse party, and without any notice to the person convicted, — they regarded the judgment as 'irregular' and discharged the party. Said Chief Justice Redfield in Ex parte Langdon, 25 Vt. 682, 'I can find no precedent for any such proceeding, and in principle it is certainly a very irresponsible authority to extend to any tribunal. It is of the essence of all convictions or adjudications that the party accused should have an opportunity to be heard in his defense. Not always before a jury perhaps, but that he should at least, in contemplation of law, have some opportunity for defense. And in convictions for contempts, which are always a summary, an arbitrary, and offensive jurisdiction (unless the contempt be committed in view of the court or

It is not necessary that the court be in actual session in order that a contempt may be committed.[1] The judge may be engaged in a legal proceeding at chambers, or may in vacation punish for a contempt.[2]

If the statute regulates, as it usually does, the punishment, then that must be followed; the act being of a criminal nature, the punishment should be in the usual manner by fine or imprisonment, or both.[3] Where the defendant is an attorney the

magistrate), the party accused is to have an opportunity to be heard before he is adjudged finally guilty of the contempt, and punished. He may be and often is committed before the conviction for the contempt. But this is done to secure his presence before the court to answer for the contempt, when he may be convicted. It seems to be assumed, as the general rule of chancery law, that the parties being served with process for the general purposes of the suit may be proceeded against and adjudged guilty of contempt without notice or excuse therefor, and punished. But this is a distinct and independent matter as much as a new suit, and obviously requires a distinct notice as much as new suit. Such is the uniform practice of courts of chancery, as far as we can learn, and for this irregularity we think the respondent is entitled to be discharged.'" Ex parte Hollis, 59 Cal. 405, citing Larrabee v. Selby, 52 id. 508; Ex parte Langdon, 25 Vt. 680; People v. Nevins, 1 Hill (N. Y.), 154; Matter of Percy, 2 Daly, 530; Re Bingham, 32 Vt. 335; In re Leach, 51 Vt. 630; Ex parte Smith, 53 Cal. 207; State v. Wilcox, 24 Minn. 145; Watson v. Nelson, 69 N. Y. 538.

[1] Commonwealth v. Dandridge, 2 Va. Cas. 408.

[2] In re Neagle, 135 U. S. 55: "The justices of the supreme court have been members of the circuit courts of the United States ever since the organization of the government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. In order to enable him to perform this duty, Mr. Justice Field had to travel each year from Washington city, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment, or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called 'chambers.' This chamber work is as important, as necessary, as much a discharge of his official duty, as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be; and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court."

[3] State v. Start, 7 Iowa, 499.

punishment should not be disbarment or the revocation of his license; that can only be done by a proceeding for that purpose.[1] The power to punish for contempt has been held by some courts to be omnipotent, and that its exercise cannot be inquired into by any other tribunal.[2] This must be taken with

[1] See note 8, p. 318.

[2] Ex parte Bradley, 7 Wall. 372: "Another ground relied on in the return for disbarring the relator is that his conduct was not merely a contempt of the authority of the supreme court, but was, also, gross misbehavior in his office as an attorney generally, and that, for this reason also, his offense was cognizable by the court in general term, and punishable irrespective of the doctrine of contempts. The judges admit that the rule to show cause ordered against him at the general term ignored the order made by Judge Fisher disbarring the relator, and called upon him to answer simply for the act and conduct specified as for a contempt; yet they insist that, after the return of the relator to the rule in answering the contempt, they had a right, in considering the answer, if any other offense appeared therein cognizable by the court, it was competent to take notice of it, and inflict punishment accordingly. We cannot assent to this view. It assumes the broad proposition that the attorney may be called upon to answer an offense specified, and, when the answer comes in, without any further notice or opportunity of defense or explanation, punish him for another and distinct offense. Certainly no argument can be necessary to refute such a proposition. It violates the commonest and most familiar principles of criminal jurisprudence. It is true, where a contempt is committed in the presence of the court, no other notice is usually necessary; but a proceeding to punish an attorney generally for misbehavior in his office, or for any particular instance of misbehavior, stands on very different ground. The rule to show cause is in the record. After reciting the offensive language and conduct complained of (all of which occurred before Judge Fisher), it concludes in these words: 'And said conduct and language requiring, in our opinion, investigation by this court, it is therefore ordered that said Joseph H. Bradley show cause, on or before the 4th day of November next, why he should not be punished for contempt of this court by reason of said offensive conduct and language towards one of its members, and relating to the official acts of the said justice.' It will be seen that the offense charged against the relator, and for which he was called upon to answer, was direct and specific, one well known to the law and the proceedings of courts — a contempt of the supreme court. And the offense being thus specified, he was fully advised of the matters against which he was called upon to defend, and enabled to prepare his defense accordingly. That the relator so understood the charge is apparent from his answer, in which he expresses his satisfaction at the opportunity afforded him to present to the court his account of the facts involved in the case, and 'to purge himself from any intentional disrespect, contumely or contempt towards the court, or any member thereof, in the transactions referred

a degree of allowance, for the court must have jurisdiction over the subject-matter and the defendant; and if the contempt consists of the disobedience of an order, the order must be a performable one, or the contempt consist of an antece-

to.' The order entered on the minutes of the court, after the answer to the rule to show cause, inflicting the punishment, confirms this view. It is found in the record, and is headed as follows: 'In the matter of Joseph H. Bradley, Sr.— Contempt of Court. Mr. Bradley having filed his answer to the rule of court served on him, and having been heard at the bar in support of his answer, it is by the court ordered that for the causes set forth in said rule the name of Mr. Bradley be stricken from the roll of attorneys, solicitors, etc., authorized to practice in this court.' The order, or judgment, seems to be in strict conformity to the offense charged in the rule to show cause, namely, for contempt of court. We do not doubt the power of the court to punish attorneys, as officers of the same, for misbehavior in the practice of the profession. This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein. If guilty of fraud against their client or of stirring up litigation by corrupt devices, or using the forms of law to further the ends of injustice,— in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court. . . . Without pursuing this branch of the case further, our conclusion is: First. That the judges of the court below exceeded their authority in punishing the relator for a contempt of that court on account of contemptuous conduct and language before the criminal court of the district, or in the presence of the judge of the same. Second. That they possessed no power to punish him, upon an *ex parte* proceeding, without notice or opportunity of defense or explanation for misbehavior, or for any particular instance, of the same generally in his office as attorney of the court, as claimed in the words of the return, 'irrespective of the doctrine of contempts.'" Bradley v. Fisher, 13 Wall. 354: "If now we apply the principle thus stated, the question presented in this case is one of easy solution. The criminal court of the district, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself or a proper regard for the integrity of the profession. And, except where matters occurring in open court, in the presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real

dent act by which the accused rendered performance impossible; and the order must be one that the court could make at the time, and the sentence of the court must be a reasonable and legal one; for I see no reason why any essential ingredient

or personal property. And even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made; for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation and apology. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their familes. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe — such as reprimand, temporary suspension, or fine — would accomplish the end desired." Ex parte Robinson, 19 Wall. 510: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of congress of March 2, 1831. The act, in terms, applies to all courts. Whether it can be held to limit the authority of the supreme court, which derives its existence and powers from the constitution, may perhaps be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by act of congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes. If we now test the report of the grand jury by this statute, we find nothing in it which justified any proceedings

to a valid judgment may not be inquired into in this proceeding as well as any other going to the jurisdiction of the court.[1] The rule, therefore, is that where there is a valid judgment

whatever as for a contempt on the part of the court below against Robinson. No act of his is mentioned which could constitute within the statute a contempt either of the court or of its judge. The allegation that the witness Stephenson, after seeing Robinson, had suddenly absented himself, amounted to nothing more than an insinuation that possibly he may have been advised to that course by Robinson. There was no averment of any fact which the court could notice or the attorney was bound to explain. . . . The power to disbar an attorney proceeds upon very different grounds. This power is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court; and, as said in Ex parte Garland, 4 Wall. 378, 'they hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.' Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample means of explanation and defense. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession as when they are taken to reach his real or personal property. And such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases undoubtedly of such gross and outrageous conduct in open court on the part of the attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged." Hawes on Jurisdiction, sec. 221: "In absence of any statutory limitation or restriction, the power of courts over contempts is omnipotent, and its exercise is not to be inquired into by any other tribunal." Ex parte Smith, 28 Ind. 47; Ex parte Adams, 25 Miss. 883; S. C. 59 Am. Dec. 234; Ex parte Edwards, 11 Fla. 183; In re Cooper, 32 Vt. 255; State v. Matthews, 37 N. H. 453; Little v. State, 90 Ind. 338; Clark v. People, Breese, 340; S. C. 12 Am. Dec. 177.

[1] State v. Baldwin, 57 Iowa, 266; State v. Start, 7 Iowa, 501; Batchelder v. Moore, 42 Cal. 413; People v. O'Neil, 47 Cal. 109; People v. Jacobs, 66 N. Y. 9; Ex parte Fisk, 113 U. S. 713.

in a contempt proceeding it is not appealable as such, but stands as a finality.

The power to punish for contempt in a proper case applies to every judicial tribunal acting within its jurisdiction. The trial is always to the court, and not through the intervention of a jury.

The law never intended to place in the hands of the court an arbitrary power that can be made a means of oppression, but it does intend to give the court power to exact due courtesy toward itself and officers, obedience to its powers, and the right to discipline the violators of its rights or authority.

§ 117. **Inferior courts.**— It has sometimes been held that inferior courts cannot punish for contempt.[1] This is usually

[1] Hawes in his work on Jurisdiction says: "Power is essential to the existence of any court. The power that makes the order can enforce it; the party who disobeys the order may be punished for it. There are no exceptions. Every person within the jurisdiction of the court, high or low, natural or artificial, is, in a proper case, subject to the power, and in case of disobedience amenable to punishment." Citing State v. Woodfin, 5 Ired. 200; Middlebrook v. State, 43 Conn. 266–8; People v. Albany & V. R. R. Co. 20 How. Pr. 358–60; First Cong'l Church v. Muscatine, 2 Iowa, 70–4; Golden Gate M. Co. v. Superior Court, 65 Cal. 188–90. But see Rutherford v. Holmes, 66 N. Y. 368; Watson v. Nelson, 69 id. 536; Noyes v. Byxbee, 45 Conn. 382; Brown v. Davidson, 59 Iowa, 463. In Rutherford v. Holmes, *supra*, the court say: "The important question in the case is whether the defendant, upon the facts now shown, had the power to commit the plaintiff for contempt. That he had jurisdiction of the person of the plaintiff, and of the subject-matter then pending, did not give him judicial authority to adjudge her guilty of a contempt and to imprison her therefor. To have that authority there must have arisen before him facts which gave him power to consider of the question whether there had been a contempt committed by her. . . . It is not contended by the learned counsel for the respondent but that a justice of the peace had that power at common law, upon a state of facts such as the defendant claims existed. Have the provisions of the statutes taken it away or so restricted that power as that it may be exercised only in the cases prescribed by written law? Clearly, if this is conceded to be a contempt known to the law as a criminal contempt, or one to be treated as a criminal contempt, the statutes are definite in taking away the power to deal with it as such. 2 Revised Statutes, page 273, section 274, specifies the acts which a justice of the peace may punish as for a criminal contempt. The conduct imputed to the plaintiff in this case is not within that classification. . . . It is also significant that the legislature, so far as it has in general terms enacted for proceedings as for contempts to enforce civil remedies, and to protect the rights of parties in civil action, has confined its action to courts of record (2 R. S. p. 534, sec. 1 *et seq.*),

true when the offense is committed out of their presence.[1] The power, being inherent, and arising as a necessary incident to order, it is believed that such courts need not have the power to punish for contempts committed in their presence expressly conferred by the statute, in order to exercise it, but that it follows by the law of necessity, in order to further the administration of justice without interruption, disturbance or insult. Where the contempt is one known as constructive or consequential, the rule may be different. But the author can see no reason why an inferior as well as a superior court is not required to preserve order and decorum in the court room, or that the dignity of a court of justice differs because one has jurisdiction of a few matters and another over many. An inherent power arises from the law of necessity, and is a natural right to persons or bodies of men to protect themselves and the dignity of an office they may fill. The law contemplates that all courts may punish for contempt, and I

and has here again provided for the punishment of persons who, as witnesses, refuse to answer. . . . But it is clear that the defendant did not assume to have authority save under the statute above cited. 2 R. S. 274, sec. 279. The warrant of commitment is, in its terms, based thereupon. It states that the plaintiff was sworn as a witness, was asked a proper and pertinent question, and refused to answer to it. It commanded the close confinement of the plaintiff until she should submit to answer the question or be discharged according to law. As that section prescribes as a prerequisite that there shall be an oath of the materiality of the testimony, and as it does not appear either from the warrant, or the evidence in this case, that such an oath was made, the defendant had no judicial authority to adjudge the plaintiff guilty of a contempt. The imprisonment order by him was unlawful, and he is liable to her in damages for his act in ordering it." Fischer v. Langbein et al. 103 N. Y. 91: "In a similar case it was said by this court that the fact that a justice of the peace 'had jurisdiction of the person of the plaintiff and of the subject-matter then pending did not give him judicial authority to adjudge her guilty of a contempt, and to imprison her therefor. To have that authority there must have arisen before him, facts which gave him power to consider of the question whether there had been a contempt committed by her. When facts arose which gave him that power, he had a right to adjudicate upon them, and is not liable to an action though he may have held erroneously as matter of law.'" See People v. Hackley, 24 N. Y. 78; Ex parte Krieger, 7 Mo. App. 367. These cases seem to hold that the power is statutory.

[1] Queen v. Lefroy, L. R. 8 Q. B. 134; Ex parte Alexander, 2 Am. L. Reg. 44; Clark v. People, 1 Breese (Ill.), 340; S. C. 12 Am. Dec. 177; Ex parte Adams, 25 Miss. 883; S. C. 59 Am. Dec. 234; State v. Galloway & Rhea, 5 Co'dw. 326.

know of no principle of the common law denying the power. The cases negativing the right seem to be those where the court had no jurisdiction of the subject-matter or of the matter in hearing, or where the duty in which the court or officer was engaged was not judicial; sometimes the facts showed that no contempt was committed.[1]

§ 118. **Superior courts.**— The power of superior courts to punish for contempt is almost unlimited. The authority is confined to the court in which the offense was committed and no other court can interfere with its exercise. The judgment of the court is final and conclusive, when the power is legally exercised, and no other court will interfere therewith.[2] In many of the states the statute regulates the extent of the

[1] Ex parte Fisk, 113 U. S. 713; Dudley v. McCord, 65 Iowa, 671.

[2] Ex parte Bradley, 7 Wall. 371: "It is plain, therefore, that according to a true construction of the act of 1863, reorganizing the courts of this district, the supreme court not only possesses no jurisdiction in criminal cases, except in an appellate form, but that there is established a separate and independent court, invested with all the criminal jurisdiction, to hear and punish crimes and offenses within the district. And, hence, one of the grounds, if not the principal one, upon which the return places the right and power to disbar the relator, fails; for we do not understand the judges of the court below as contending that if Judge Fisher, at the time of the conduct and words spoken by the relator before him, or in his presence, was not holding the supreme court of the district, but was holding a court distinct from the supreme court, that they possessed any power or jurisdiction over the subject of this contempt as complained of; otherwise the case would present the anomalous proceeding of one court taking cognizance of an alleged contempt committed before and against another court which possessed ample powers itself to take care of its own dignity and punish the offender. Under such circumstances, and in this posture of the case, it is plain that no authority or power existed in the supreme court to punish for the contempt thus committed, even without reference to the act of congress of 1831, which in express terms restricts the power, except for 'misbehavior in the presence of said courts, or so near thereto as to obstruct the administration of justice.'" Ex parte Robinson, 19 Wall. 510: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of congress of March 2, 1831." See Ex parte Crittenden, 7 Pac. L. J. 483; S. C. 62 Cal. 534.

punishment to be inflicted; and where the contempt consists of the offender's refusal or omission to perform an act which it is in his power to perform, he may be imprisoned until it is performed.[1] In such cases the purpose of the proceedings is to vindicate the authority of the court whose order has been disobeyed, rather than to afford a remedy to the complaining party.[2]

Whatever order the court makes within its power must be obeyed until revoked or modified. If deemed erroneous or improvident, it should be appealed from, but should be obeyed while in force.[3] A careful distinction between an erroneous

[1] Watson v. Williams, 36 Miss. 331; Ex parte Rush, 60 Cal. 5; Ex parte Perkins, 18 Cal. 60; People v. Nevins, 1 Hill (N. Y.), 154; Rex v. Sheriff of Middlesex, 1 H. Black. 544; State v. Tipton, 1 Blackf. 166. See, also, Johnston v. Com. 1 Bibb, 598, for strict rule, and State v. White, T. U. P. Charlt. 136, where it is said: "In proceedings for contempts if the return shows a good cause of commitment it will be valid, though it may want form. This court will not, therefore, discharge persons committed for a contempt of the inferior courts, and especially this court will not discharge or admit to bail officers of such inferior courts committed for a contempt against them." In Ex parte Cohen, 5 Cal. 495, it was said: "In the examination of this question we should be careful to distinguish between the erroneous exercise of a power conferred by law and the usurpation of power. If the district court has jurisdiction, under any circumstances, to make an order requiring persons not parties to the record to deliver property to the officer of the court, the issuance of such order in an improper case would be error certainly, which an appellate court would correct, but would not be an usurpation of power or an excess of jurisdiction." See, also, Ex parte Summers, 5 Ired. 149, for doctrine that if the court does not state the facts upon which it proceeds, a revising tribunal may on a *habeas corpus* discharge the party, if it plainly appear that the facts do not amount to a contempt. See State v. Woodfin, id. 199; Robb v. McDonald, 29 Iowa, 330; Davison's Case, 13 Abb. Pr. 129; Kahn's Case, 11 Abb. Pr. 147; Wicker v. Dresser, 13 How. Pr. 331. See *contra*, Shepherd v. Dean, id. 173; People v. Jacobs, 66 N. Y. 8; Batchelder v. Moore, 42 Cal. 414; Phillips v. Welch, 12 Nev. 158; In re Blair, 4 Wis. 522; Ex parte Perkins, 18 Cal. 60; Ex parte Cohn, 55 Cal. 193.

[2] See above cases.

[3] Gates v. McDaniel, 4 Stew. & Port. 69; Penn v. Messinger, 1 Yeates, 2; Ex parte Tillinghast, 4 Pet. 109; Sullivan v. Judah, 4 Paige, 444-46; People v. Bergen, 53 N. Y. 410: "The order of the 20th of December, 1872, was in accordance with and in execution of the judgment under which the premises were sold, and was within the jurisdiction of the court. If it was improvidently or erroneously granted, the remedy of the party aggrieved was by application to vacate it, or by appeal. It is not void, and it cannot be reviewed upon an application to punish for a disobedience of it. So

and improvident order and one that is illegal must be made, for when the order is void no one is required to obey it.[1] It should also be considered that all proceedings for contempt are *quasi* criminal in their nature, and the intent of the party enters into and becomes part of the offense; and without this intent, so entering, it ought not to be said there is an offense.[2]

long as it remains in force the duty of all parties is to obey it, and the merits of the order are not reviewable. People v. Sturtevant, 9 N. Y. 263; Sullivan v. Judah, 4 Paige, 444; Higbie v. Edgarton, 3 id. 253. Neither is it a defense in proceedings to punish for a contempt that an appeal has been taken from the order. If the proceedings have not been stayed, the party has a right to take every step for the enforcement of his civil right that he might if no appeal was taken. In this case the proceedings are not stayed, but the relator has, by express permission of the court, the privilege of making such application under the order as his counsel may advise." Easton v. Pickersgill, 75 N. Y. 600.

[1] Hawes on Jurisdiction, sec. 224: "We have seen that a contempt often consists in doing otherwise than is commanded, or not doing what is enjoined or required by the process, order or decree of a court. If a court has jurisdiction to make an order, it is obligatory until reversed by an appellate court. As long as the order remains in force, the duty of all parties is to obey it; but if the judgment has been satisfied of record, there can be no rule for contempt. When an order has been erroneously or improvidently granted, the remedy is by application to vacate it, or by appeal. If, however, the order which is alleged to have been violated was made without jurisdiction, and required what the court had no right to require as a matter of legal authority, it is of no force, and no one is guilty of legal wrong in disobeying it. Haines v. Haines, 35 Mich. 142, 148. And see People v. Simonson, 10 Mich. 336; Perry v. Mitchell, 5 Denio, 539, 540. So when a judge made an order in another district, the proper judge thereof holding a regular session of court at the time. People v. O'Neil, 47 Cal. 109; Brown v. Moore, 61 Cal. 433; Williams v. Dwinelle, 51 Cal. 446; People v. Sturtevant, 9 N. Y. 266; Williamson's Case, 26 Pa. St. 14. And so the acts constituting the alleged contempt must not only be clearly proved, but they must be a positive violation of the plain terms of the process or order of the court. The act for the commission of which punishment is invoked must be one which the court has expressly forbidden; the disobedience complained of must be wilful. If the order be ambiguous or doubtful, or fairly of a construction consistent with innocence of unintentional disrespect, the court should not interfere. Weeks v. Smith, 3 Abb. Pr. 212; State of Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 429, 436; In re Cary, 10 F. R. 623, 625."

[2] Notes on R. S. U. S. sec. 724: Proceedings to punish contempts have been held to be purely criminal (Re Ellerbe, 18 F. R. 530; 4 McCrary, 449; United States v. Berry, 24 F. R. 783), and to be governed by the strict rule of construction applicable to criminal cases. United States v. R. R. Co. 16 F. R. 853; Fischer v. Hayes, 6 id. 63.

Besides, the order should not be doubtful or ambiguous, and the court should construe the act complained of with reference to the order and its terms; and if by any fair construction it appears the offender has not acted wilfully, though mistakenly, he should not be punished, but the presumption of innocence should prevail.

§ 119. Disobedience to orders for payment of money.— In speaking of this class of orders we may say that courts are constantly called upon to enforce the payment of money by

But that some are civil and some are criminal, see Re Graves, 29 F. R. 60; Worden v. Searls, 121 U. S. 26; and civil contempts and criminal contempts were distinguished in Re Graves, *supra*. In common-law actions, proceedings for contempt are properly in the name of the government, but the practice is otherwise in equity. Hendryx v. Fitzpatrick, 19 F. R. 812; Sharon v. Hill, 24 id. 726. In patent cases it is usual to embrace in one proceeding both civil and criminal remedies, *i. e.*, to punish the defendant if found guilty, and, at the same time, or as an alternative, to assess damages and costs for the benefit of the plaintiff. Hendryx v. Fitzpatrick, *supra*. For cases to the effect that the courts cannot impose punishment by way of damages or compensation of the other party, see United States v. R. R. Co. *supra;* Vanzandt v. Mining Co. 2 McCrary, 642; Re Chiles, 22 Wall. 163; Durant v. Supervisors, Woolw. 377; New Orleans v. Steamship Co. 20 Wall. 392; Kirk v. Milwaukee Manuf. Co. 26 F. R. 508. *Contra*, Re Mullee, 7 Blatch. 23; Doubleday v. Sherman, 8 id. 45; Searls v. Worden, 13 F. R. 716; Re Graves, *supra;* Hendryx v. Fitzpatrick, *supra;* Schillinger v. Gunther, 14 Blatch. 152; Phillips v. Detroit, 3 Bann. & Ard. 150; Dunks v. Grey, 3 F. R. 862; Matthews v. Spangenberg, 15 id. 813; Wells v. Railway Co. 19 id. 20. That in proceedings for contempt the court cannot make an order in the nature of further directions for the enforcement of its previous decrees, see United States v. R. R. Co. *supra;* Fischer v. Hayes, *supra*. Contempt is a crime against the United States within section 33 of the judiciary act of 1789 (R. S. sec. 1017; United States v. Jacobi, 1 Flippin, 108; United States v. R. R. Co. *supra;* United States v. Berry, *supra;* Re Mullee, *supra;* Kirk v. Milwaukee Manuf. Co. *supra*), and the fine goes to the United States (Fanshawe v. Tracy, 4 Biss. 497; Kirk v. Milwaukee Manuf. Co. *supra*); but this is true only in criminal proceedings. Re Graves, *supra*. A contempt is an offense against the United States within the terms of the constitution which authorizes the pardon of offenses. Dixon's Case, 3 A. G. Op. 622; Conger's Case, 4 id. 317; Rowan's Case, id. 458. A corporation may be fined for contempt. United States v. R. R. Co. 6 F. R. 240; Wells v. R. R. Co. *supra*. Contempt of an order to pay money may be punished by an order of attachment, in spite of statutes prohibiting imprisonment for debt. Bogart v. Supply Co. 23 Blatch. 552; Jeffries v. Laurie, 27 F. R. 198. Commitment until the payment of a fine is not imprisonment within the statute. Fischer v. Hayes, 19 Blatch. 21.

converting the remedy provided for by execution into a proceeding for contempt.[1] There is generally no power vested in a court of chancery or of probate to enforce its final order or decree for the payment of money against administrators, executors, guardians or assignees unless the order provides for payment out of a particular fund shown to be in the hands of the defendant, which he wilfully refuses to pay.[2] The rule is in such proceedings not to so enforce the payment of money. If he is holding the money as an officer of the court, with only the naked power to preserve it, the order is sometimes so enforced; and where he held money and wrongfully disbursed it.[3]

[1] See In re Bingham, 32 Vt. 335; In re Leach, 51 Vt. 630. But see Ex parte Smith, 53 Cal. 207; Galland v. Galland, 44 Cal. 475.

[2] State v. Becht, 23 Minn. 411. Wise v. Chaney, 67 Iowa, 73: An order required plaintiff to pay to the administrator certain money of the estate, which the court found had come into the hands of plaintiff, and which he failed to pay over. The plaintiff made a showing to purge himself of contempt in failing to obey the order, to the effect that he had received the money as a mere clerk of a prior administrator, who had been removed, and that he had disbursed the money in payment to the widow of the deceased, for the support of her family, and in the discharge of claims against the estate. He also showed that he had no money, either of his own or of the estate, in his possession. The circuit court, holding that plaintiff had failed to purge himself of contempt, ordered him to be imprisoned until he should pay the money in obedience to the order. "The proceedings resulting in the order of the court requiring plaintiff to pay the money found to be in his hands are authorized by Code, sections 2379, 2380. We cannot in this case inquire whether the evidence before the circuit court justified the order, and thus review, as upon an appeal, that decision. The contempt for which the plaintiff stands committed consists in disobedience of this order without sufficient justification or excuse therefor. We are required to determine whether there was such a disobedience without excuse, for the circuit court would not have jurisdiction to punish for the contempt unless it in fact existed. The statement of plaintiff made to purge himself of contempt shows the receipt of the money of the estate. But it fails to show lawful excuse for not paying it over upon the order of the court. Plaintiff had no right to disburse the money as shown by him. This could have been lawfully done only by the administrator under authority and approval of the court. His other excuse, that he had no money of his own in his possession, will not do. It would be a convenient way, if this excuse should be regarded as sufficient, for one required to surrender money or property of an estate to divest himself thereof, and thus defeat the order of the court and justice." Watson v. Nelson, 69 N. Y. 536; Bogart v. Supply Co. 23 Blatch. 552; Jeffries v. Laurie, 27 Fed. Rep. 198; and see *ante*, § 118 and notes.

[3] But see Hendryx v. Fitzpatrick, 19 Fed. Rep. 810; United States v.

A party should not be punished for contempt for failing to perform an act not in his power to perform, unless he has wilfully and contumaciously disabled himself from doing it. When he fails to perform an act he might perform and refuses and disobeys the court, his application for favor will not be granted until he purges himself of the contempt. There should always appear to be obstinacy or wilful disobedience of the order of the court.[1]

The court will not, as a rule, lend its aid to compel the payment of alimony in divorce cases by proceedings of contempt, though such rule has been enforced in some states; but the better rule is that process by contempt will not be resorted to for the purpose of compelling the payment of money if there is any other remedy; and where process by execution may be

Sowles, 16 Fed. Rep. 536; Clements v. Tillman, 79 Ga. 451; Maulsby's Case, 13 Md. 641; In re Wilson, 75 Cal. 580; People v. Wilson, 64 Ill. 195; Ex parte Robertson, 27 Tex. App. 628.

[1] Ex parte Robertson, 27 Tex. App. 628; S. C. 11 Am. St. Rep. 211: "But it is insisted in this proceeding that the fine and imprisonment inflicted upon the officer, being imposed for the purpose of securing and enforcing the payment of a debt due to the plaintiff, A. A. Cooper, in the sequestration suit, is in contravention and violation of the eighteenth section of the bill of rights of the constitution, article 1, which declares that 'no person shall ever be imprisoned for debt.' In the article of Mr. Thompson above referred to he says, speaking of this character of fines: 'Such a fine is in no sense a civil debt.' In Dixon v. State, 2 Tex. 481, it is said the words 'imprisonment for debt' had a well-defined and well-known meaning, and have never been understood or held to apply to criminal proceedings, nor to imprisonment inflicted as a punishment consequent upon the violation of the laws and a contumacious refusal to submit to the pecuniary penalty imposed. At page 174, volume 5, Criminal Law Magazine, Mr. Thompson says: 'Since the abolition of imprisonment for debt in the United States the idea of those contempts which are termed remedial contempts has come to be the refusal to do something which a party is adjudged to do, and which it is in his power to do. Even in remedial contempts of the mildest character there is, therefore, the essential idea of contumacy, wilful disobedience of orders and decrees made in the administration of justice. This is an offense against the administration of justice and against society. It hence implies criminality. This idea of criminality is so far a necessary ingredient of everything which is called a contempt that every contempt may be said to be a criminal contempt. It is necessary to consider this in order to understand what the courts mean when they say, as they do, without discriminating as to the kind of contempt, that contempts are crimes or misdemeanors, and that proceedings to punish contempts are criminal proceedings."

had the court will not issue the process of attachment.[1] There are cases stated in the notes where the rule for payment of alimony has been enforced by this proceeding.[2] Where such rule has been enforced the offender has been shown to have been contumacious, or to have voluntarily disabled himself from performing.

[1] See note 3 above. Baily v. Baily, 69 Iowa, 77: "Under the statutes of some of the states and the present English practice, a failure to comply with an order of the court granting temporary alimony is regarded as a contempt and its payment is enforced by the commitment of the husband. It is probably true that a party who is in contempt has no right to be heard in defense of the action in which it has been so adjudged. It was so held in New York by the court of appeals in Walker v. Walker, 59 How. Pr. 476. In McClung v. McClung, 40 Mich. 493, it was held that the time to take proofs would not be extended to a party who was in contempt for refusing to pay temporary alimony. The order under consideration simply directs the payment of money, and, upon default being made, judgment therefor is directed to be entered. It is provided by statute that 'judgments or orders requiring the payment of money or the delivery of the possession of property are to be enforced by execution. Obedience to those requiring the performance of any other act is to be coerced by attachment for contempt.' Code, sec. 3026. It is evident that the defendant, by his failure to comply with the order, was not guilty of a contempt, and, as the order must be enforced by execution, it seems necessarily to follow that he cannot be deprived of his right to defend the action because of such failure." Wightman v. Wightman, 45 Ill. 168; North v. North, 39 Mich. 67; Haines v. Haines, 35 Mich. 142; Ryer v. Ryer, 67 How. Pr. 369; In re Dissosway, 91 N. Y. 236; Fischer v. Raab, 81 N. Y. 237; Swift v. Clark, 63 Ind. 81. Where the failure to pay is wilful, see Dinet v. People, 73 Ill. 183; In re Daves, 81 N. C. 73. Park v. Park, 80 N. Y. 160: "The objection that the court had no jurisdiction to decree alimony because no complaint demanding alimony was served is not well taken. As we have seen, service of a copy of the decree was sufficient; and as it does not appear that the judgment exceeded the demands of the complaint no injustice was done. The proper course, if the judgment was wrong in this respect, would be to move to vacate or modify the same. We think that the plaintiff was not estopped from enforcing payment of alimony by reason of the provision in the decree authorizing an execution to be issued. The proceeding is for disobedience of an order of the court and to compel the defendant to furnish the security required by the decree, and the final order of the special term provides for this as to future alimony. The provision that execution may issue does not interfere with the order that security be furnished. The position that payment of the costs and alimony cannot be enforced by proceedings for contempt is sufficiently answered in the opinion of the general term, with which we concur, and does not require discussion."

[2] See n. 1, p. 325, and n. 1, p. 326; Wright v. Wright, 74 Wis. 439.

The court will, in proceedings supplementary to execution, sometimes compel the defendant to turn over property in his possession for the payment of a debt when the statute authorizes it. In such cases the statute applies the remedy as a means of enforcing the payment.[1] But where the act is one that the party can comply with, the rule is different; and courts of law and chancery will compel compliance, and exercise the power promptly.[2]

§ 120. Violation of injunctions and similar orders.— The proceeding for contempt for the violation of writs of injunction, prohibition, inhibition or the mandates of courts is very common, because it is the only means for the enforcement of

[1] Ex parte Kellogg, 64 Cal. 343.

[2] Worden v. Searls, 121 U. S. 14; Arnold v. Commonwealth, 80 Ky. 300; Ex parte Crittenden, 62 Cal. 534; Cromartie v. Commissioners, 85 N. C. 211. Clark v. Bininger, 75 N. Y. 349: "We are also of the opinion that the contempt adjudged did not come within the fourth section of the statute. The order of April 16th substantially adjudged that he was in possession of a fund committed to him as an officer of the court, and directed him out of that fund, held by him officially, to pay a certain sum to Titus. This is very different from an order to pay a sum of money at all events. It was a direction of the court to its receiver as to the disposition of a certain fund in the custody of the court and committed to him solely as its receiving and disbursing officer. The disobedience of this order comes rather within the first subdivision of the first section of the statute, as a disobedience by a person 'appointed to perform . . . ministerial services' of a lawful order of the court, and a 'misbehavior in his office and wilful neglect of duty therein,' than the third subdivision, although his offense included those described in the latter subdivision. 2 R. S. 534, sec. 1, subs. 1, 3. It was therefore proper practice not to issue a precept without notice to him, as provided in the fourth section, but to grant an order to show cause why he should not be punished for his 'misconduct.' Woodruff, J., was probably right in saying that with reference to the precept under the fourth section it may be issued *ex parte*, without regard to the ability of the party to pay the money, and whether his disobedience was wilful or not. People v. Cowles, 3 Abb. Ct. of App. Dec. pp. 507, 510. See, also, In re Kelly, 62 N. Y. 198. But here a wilful contempt as an officer of the court was charged, and according to the statute he must have an opportunity to be heard, and there must be an adjudication that he was guilty of misconduct. All this was done, and we think that the wilful refusal of a receiver to obey an order requiring a payment by him out of funds in his hands as receiver is clearly distinguishable, upon principle and authority, from the ordinary case of failure to comply with a direction to pay a sum of money generally. People v. Cowles, *supra*, Rapallo, J.; In re Watson v. Nelson, 69 N. Y. 536, 545."

their orders. The court requires obedience both in letter and spirit, and will not permit any evasion by mere passive obedience. The person enjoined from doing an act must not only cease himself, but his attorneys and servants must not do it by his assent, command or acquiescence. The order must be implicitly obeyed so long as it is in force, whether erroneously granted or not.[1] There is a respect due to the mandate of equity, and disastrous consequences must follow as an inevitable result from allowing parties against whom restraining orders are granted to be themselves judges of the regularity of the proceedings or propriety of the relief. These mandates are to be observed strictly until properly annulled.[2]

The fact that the injunction was broader in its terms than

[1] 2 High on Injunctions, sec. 1416: "The granting of injunctions, being justly regarded as one of the highest prerogatives of courts of equity, the most exact and implicit obedience is required from those against whom the mandate of the court is directed. With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction in the first instance, it must be implicitly obeyed as long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved." Moat v. Holbein, 2 Edw. Ch. 188; Partington v. Booth, 3 Meriv. 148; Rogers Manuf. Co. v. Rogers, 38 Conn. 121; Woodward v. Earl of Lincoln, 3 Swanst. 626; People v. Sturtevant, 9 N. Y. 263; Sullivan v. Judah, 4 Paige, 444; Richards v. West, 2 Green Ch. 456. And see Fennings v. Humphery, 4 Beav. 1; Blake v. Blake, 7 Beav. 514; Chuck v. Cremer, 2 Ph. 113; Erie Co. v. Ramsey, 45 N. Y. 637; Mayor v. N. Y. & S. I. F. Co. 64 N. Y. 623. "And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to question the authority of the court to grant relief upon the facts stated, except upon application to dissolve the injunction." Richards v. West, *supra*. As to practice, see Watrous v. Kearney, 79 N. Y. 497; Stimpson v. Putnam, 41 Vt. 244. Baker v. Cordon, 86 N. C. 116: The defendant sold to the plaintiff his druggist's business and agreed not to carry on that business in that town. Subsequently he bought a new stock and opened the like business at the same stand. He was enjoined by the court from so carrying on such business. Within a week thereafter he sold his new stock to two farmers residing several miles distant, ignorant of the business and paying no personal attention to it, and commenced acting as their hired manager and agent in the business at the same stand. *Held*, that he was guilty of contempt in disobeying the injunction, and could not purge himself by disavowal.

[2] See above, note 1.

the bill asked, or its prayer would warrant, is no excuse for non-observance. The violation is a contempt of the court from which it issued, and the contempt will be punished accordingly. If the injunction was improperly or improvidently made, the court may consider that fact in punishing the breach thereof, but it is no defense.[1] It has, however, been said that when the injunction was broader in its scope than the bill, the defendant should not be punished for the violation of the writ in excess of the terms of the bill.[2] The fact of the guilt of the defendant must clearly appear to the satisfaction of the court.[3]

The defendant cannot relieve himself from the contempt by showing that what he did was done by the advice of counsel, or that the service of the writ was defectively made upon him. Such advice may be heard in mitigation of punishment when relied upon and acted on in good faith.[4] Where the party defendant has notice of the order for an injunction, the writ is operative from the date of the order, not the date of the writ; for if the defendant knew of the order, or was actually ap-

[1] Richards v. West, 2 Green's Ch. 458: "If the places where the cutting has been continued are within the injunction the facts sought to be established by the defendant cannot avail him on this motion. A party is not at liberty to speculate upon the intention or question the authority of the court. While the writ remains undissolved or not set aside its commands must be implicitly obeyed. . . . From the terms of the writ it is evident the whole tract is covered by it. Its meaning is so plain that there can be no question about it. In cases of this kind the writ should be the criterion for the party who is enjoined. It embodies the order of the court upon the complaint made, and it should always be plain and certain on the face of it, so that the party may understand it without any reference to the bill filed. If, on inspection of the bill, the injunction is found to be too broad, the defendant is not to abridge it at his discretion. His remedy is to apply for such a modification of it as is suited to the case made in the bill, and, in the meantime, he must obey the command of the writ."

[2] Partington v. Booth, 3 Meriv. 148; Freeman v. Deming, 4 Edw. Ch. 598. The vice-chancellor, in the course of his opinion, observed: "The language of the injunction differs from the prayer of the bill; but it is, nevertheless, to be understood as if it followed the prayer, and the defendants are to be enjoined no further than the bill requires." Erie Co. v. Ramsey, 45 N. Y. 637; Watson v. Citizens' Sav. Bank, 5 S. C. 159.

[3] Probasco v. Probasco, 30 N. J. Eq. 61; Magennis v. Parkhurst, 3 Green's Ch. 433; Mead v. Norris, 21 Wis. 310; McKillopp v. Taylor, 10 C. E. Green, 139.

[4] Quackenbush v. Van Riper, 2 Green's Ch. 350.

prised of it, he is liable. Hence, it has been held that when a party knew of an order being made by the court to restrain him from committing waste, and the purport of the order was explained to him, he was liable for its violation, even though he acted under the advice of counsel.[1] And this is true where there has been great negligence. Notice by telegraph that the order has been made has been held good.[2]

If the court had no jurisdiction to grant the order, the violation is no contempt; and, probably, where the injunction by

[1] 2 High on Injunctions, sec. 1421: "In considering the question of a defendant's liability for a breach of injunction it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the date of the writ itself, or from the time of its being drawn up. McNeil v. Garratt, 1 Cr. & Ph. 98; James v. Downes, 18 Ves. 522. And see Hearn v. Tennant, 14 Ves. 136. The mandate of the court, being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation, it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts constituting the violation. Thus, where an injunction is granted to restrain the commission of waste, and before the writ actually issues or the order is drawn up defendant is notified of the order, and its purport and effect are verbally explained to him, the cutting of timber after such notice constitutes a breach of the injunction. Vansandau v. Rose, 2 Jac. & W. 264. And see Gooch v. Marshall, 8 W. R. 410. So where an injunction is ordered against the commission of waste and the sale of crops, and the defendant is served with written notice thereof, but proceeds to sell in disregard of the notice, although admitting his belief that the order was made, he is guilty of a violation of the mandate of the court, even though he claims to have acted under the advice of counsel. Kimpton v. Eve, 2 Ves. & B. 349."

[2] 2 High on Injunctions, sec. 1424: "Notice by telegraph of the granting of an injunction is also deemed sufficient to render the defendant liable for contempt in disregarding it, although not formally served with the writ. Thus, a sheriff who proceeds with a sale of property under execution after having actual knowledge of the proceedings in bankruptcy by the judgment debtor, and being informed of the injunction by telegraphic dispatch, violates the injunction by proceeding with the sale. In re Bryant, 4 Ch. D. 98. So where an injunction issues against the president of a corporation, its officers and members, and is served upon the president in person, and is read aloud in the hearing of other officers and members, who afterward proceed with the performance of the act enjoined, they are guilty of a contempt of court, although never served with process in the cause or with the order of injunction. Rorke v. Russell, 2 Lans. 242. But it has been held that service of an injunction upon defendant's clerk in court is not such service as to render defendant liable in proceedings for a violation of the injunction."

its terms is broader than the bill, the true reason why the court refuses to punish for the violation of the order in excess of the prayer of the bill asking it is that such part of the order was a nullity.

§ 121. Legislative bodies, powers of. — It has been held that legislative bodies could punish for contempt, and it was expressly so ruled by the supreme court of the United States more than sixty years ago.[1] But this decision has been substantially overruled by that same high court in the case of Kilbourn v. Thompson, 103 U. S. 168. In that case Justice Miller, in delivering the opinion of the court, shows that the original authority vested in the English parliament to punish contempts rested on the fact that it was a court of general jurisdiction. Congress, and legislative bodies generally, possess but limited judicial powers, and can only punish for contempt except when necessary to preserve order, and while exercising judicial power. The commitment of one to prison for a contempt requires a judicial body capable of rendering a judgment. To render judgment contemplates a trial; a trial can only be conducted by a court, and only had before a court. Under the constitution of the United States the judicial power is vested in the supreme court and in such inferior courts as congress may from time to time ordain and establish. The power to punish for contempt is therefore a judicial power that can only be exercised by a court. The jurisdiction of a court is always open to inquiry to determine whether it had the power to render the judgment affecting the individual rights of the plaintiff.[2] Congress and other similar bodies are not courts of law to decide private rights, but law-making bodies, and have no power to hear, try and determine a cause. Congress has no right to impose a judgment for contempt, except in cases where it acts as a court, by authority granted by the constitution of the United States, as in the trial of a case of impeachment, and in proceedings where it has jurisdiction to so act. It is by the constitution made the judge of the election and qualification of its own members, and may fix their punishment for disobeying its rules. It also has inherent power to preserve order

[1] Anderson v. Dunn, 6 Wheat. 204.

[2] Burnham v. Morrissey, 14 Gray, 226; Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; Knowles v. Gas Light & Coke Co. 19 Wall. 58.

in its own body and punish the violators of its rules, such power being essential to its protection.[1]

§ 122. **Generally.**— Proceedings for contempt arise in almost every form before the various courts;—sometimes against witnesses for refusing to testify; sometimes for failing to appear; often against counsel for a hasty word spoken to the court when the court itself is not an example of patience; often when under excitement a party is moved to do an act which is not proper but more or less excused by the occasion. Hence the legislatures in some states have provided safeguards to review the proceedings, requiring the evidence to be taken down and made of record, and permitting an appeal. We hope in all cases, particularly where an offended court is vindicating itself for a supposed affront to its dignity, that provisions for an appeal will be made, or some means be provided for a review of proceedings that often involve the liberty of the defendant when he is more sinned against than sinning.[2]

[1] United States v. Lee, 106 U. S. 220: "These provisions for the security of the rights of the citizen stand in the constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See Ex parte Milligan, 4 Wall. 2; Kilbourn v. Thompson, 103 U. S. 168. No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class."

[2] Batchelder v. Moore, 42 Cal. 413; People v. O'Neil, 47 Cal. 109. For proceedings see Ex parte Sternes, 77 Cal. 156. When a person is imprisoned for contempt, unless the proceedings leading thereto are so grossly defective as to render them void, the judgment of commitment, in the absence of statute, cannot be reviewed in any other tribunal. Robb v. McDonald, 29 Iowa, 330; Ex parte

Adams, 25 Miss. 883. No appeal lies from a judgment for contempt. Shattuck v. State, 51 Miss. 50; Easton v. State, 39 Ala. 551. Contempt is a specific criminal offense, and the power to punish it belongs to the court in which or against which it was committed, and no other court, not even the highest tribunals, can interfere with the exercise of this authority by writs of *habeas corpus*, *mandamus*, or otherwise. Williamson's Case, 26 Pa. St. 9; State v. Galloway, 5 Cold. 326. It was even decided that a judgment of conviction for contempt is not subject to revision by any court, whether co-ordinate or of superior jurisdiction, either by appeal, writ of error, or otherwise; and that it makes no difference that the judgment is void. Ex parte Adams, *supra*. A recital in record by the court that defendants in proceedings had been served with process is evidence that they were so served, and that the court had jurisdiction of their persons; and such judgment and the record thereof cannot be attacked collaterally for irregularity or for fraud. Brickhouse v. Sutton, 99 N. C. 103; Hahn v. Kelly, 34 Cal. 391. See note to Melia v. Simmons, 30 Am. Rep. 748. Where the jurisdiction of a court depends upon the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact. Thornton v. Baker, 15 R. I. 553. See §§ 115*a* and 116, and notes.

CHAPTER XIII.

PROBATE COURT JURISDICTION.

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§ 123. Probate courts.— Probate courts, in a qualified sense, and as now known, are mere creatures of statutes. Though they were existent before the English ecclesiastical courts, their present functions are largely borrowed from and moulded after those of the tribunals named. They are, like all other tribunals in the United States, creatures of the statute; nevertheless the precedents of the common law afford great aid to them in the discharge of their important functions.

All American and English estates, in fact the property of

the civilized world, passes through the hands of this court, or one of similar jurisdiction, every twenty-five years. The probating of wills and granting letters of administration is generally exclusively confined to such courts, and their action cannot be reviewed by *certiorari* or writ of error.[1] In some states an appeal now lies to courts of general jurisdiction, and this court is losing its absolute power; but even now courts of chancery constantly refuse to relieve parties from fraud or mistake against the judgment of the probate court in setting aside wills once probated, even when the will probated was forged.[2] The ground of this ruling is that there is ample power in the probate court to act in such cases and correct abuses.[3] To this important branch of jurisdiction — the settlement of the estates of decedents — has been added, in most of the states, jurisdiction over the estates of infants and other persons subject to guardianship, and the adoption of children. While its jurisdiction is limited to these important matters, such jurisdiction is in its nature exclusive.[4]

§ 124. Elements of jurisdiction.— The first and elementary step leading to the jurisdiction — I may properly say the basis of jurisdiction — is the death in fact of the owner of the estate of which the probate court is asked to take charge; for it does not administer upon the estates of the living, but only on the estates of those that are in fact dead.[5] The death of such

[1] Peters v. Peters, 8 Cush. (Mass.) 529; Smith v. Rice, 11 Mass. 507. See Wood v. Myrick, 9 Minn. 149; Holbrook v. Cook, 5 Mich. 225; Conrad v. Button, 28 Mich. 365; Cameron v. Bentley, 28 Mich. 520; Churchill v. Burt, 32 Mich. 490.

[2] Holden v. Meadows, 31 Wis. 284; Archer v. Meadows, 33 Wis. 166; State v. McGlynn, 20 Cal. 235; Broderick's Will, 21 Wall. 503; Tompkins v. Tompkins, 1 Story, 547.

[3] Broderick's Will, 21 Wall. 509; Waters v. Stickney, 12 Allen (Mass.), 1; Morgan v. Dodge, 44 N. H. 258.

[4] Brook v. Chappell, 34 Wis. 413: "The jurisdiction here conferred is co-extensive with that possessed by any court of equity or of law in a case of this description, which clearly relates to the settlement and distribution of the estate of the testator."

[5] Roderigas v. East River Savings Institution, 76 N. Y. 320: "At common law the authorities are uniform that the jurisdiction of surrogates is confined to granting administration upon the estates of deceased persons, and that if a person is alive the letters are an absolute nullity. Jochumsen v. Suffolk Bank, 3 Allen, 87; Allen v. Dundas, 3 T. R. 125; Griffith v. Frazier, 8 Cranch, 9. . . . An important point to determine in this case is, What is the general subject-matter of which the surrogate has jurisdiction? Is it to grant administration upon estates? Clearly not,

owner is not a question of proof or judicial determination, although it is generally averred in the application for probate of the will or appointment of administrators; but it must in fact be true; and a finding by the court that the owner of the estate is dead will not give jurisdiction if he is in fact alive.[1]

but only to grant administration upon the estates of deceased persons. There is no authority conferred under any possible circumstances to grant administration when a person is living; but if a person be actually dead then the surrogate is vested with power over the general subject-matter. . . . This principle is illustrated in Allen v. Dundas, 3 T. R. 125, where it was held that payment to an executor of a forged will was a good discharge; and this was put upon the ground that the court had jurisdiction over the subject-matter, and having judicially determined the validity of the will it was good until reversed, and the distinction above referred to is recognized. Ashhurst, J., said: 'The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the ecclesiastical court has no jurisdiction; nor can they inquire who is his representative; but when the party is dead it is within their jurisdiction.' And Buller, J., said: 'Then this case was compared to a probate of a supposed will of a living person, but in such a case the ecclesiastical court have no jurisdiction and the probate can have no effect. Their jurisdiction is only to grant probates of the wills of dead persons.' In Griffith v. Frazier, 8 Cranch, 9, the same distinction is laid down by Marshall, C. J., between an erroneous act or judgment by a tribunal having cognizance of the subject-matter and an act of a tribunal not having such cognizance. He says: 'But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of the administrator. The case in truth was not one within his jurisdiction.' McArthur v. Scott, 113 U. S. 398." Sheldon v. Wright, 5 N. Y. 497.

[1] Hawes on Jurisdiction, sec. 74: "Administration may lawfully be had upon the estate of a dead man, but not upon that of one in life. Until death occurs there is no 'subject-matter,' over which it is possible for any court to exercise jurisdiction. Notwithstanding the question of death has been determined by the probate court, the fact that the supposed decedent is alive may be shown, and when proved establishes the nullity of the entire proceedings. Stevenson v. Superior Ct. 62 Cal. 60; S. C. 3 Am. Prob. Rep. 425; D'Arusment v. Jones, 4 Lea, 251; S. C. 2 Am. Prob. Rep. 424; Melia v. Simmons, 45 Wis. 334; S. C. 1 Am. Prob. Rep. 143; 30 Am. Rep. 747; Thomas v. People, 107 Ill. 517; S. C. 47 Am. Rep. 458; Johnson v. Beazly, 65 Mo. 250; S. C. 27 Am. Rep. 285; Roderigas v. Savings Inst. 63 N. Y. 460; S. C. 20 Am. Rep. 555; S. C. 76 N. Y. 316; S. C. 32 Am. Rep. 309; Allen v. Dun-

While there is a very respectable authority deciding otherwise, the decision was by a divided court, and it is clearly contrary to the current of authority, even where the attack on the proceeding in probate is made collaterally.[1] The very subject-matter of the jurisdiction is the fact of death, and if the fact does not exist, all proceedings pertaining to the administrative powers of the court over the estate are null and void.

The will of a person not deceased is simply inchoate, designed only to become operative upon the death of the devisor, liable to be by him annulled at any time. If there be no will, the title of the property remains in the living owner, not subject to administration. The dower of the widow is also inchoate; the title to the real estate has not vested in the heirs, nor does the title to the personalty vest in the administrator on his appointment.

§ 125. Probate court, duties of — When jurisdiction attaches.— When jurisdiction attaches the probate court has the power, when invoked, to take charge of the estate of the deceased person, when such estate is situated in the proper county or district, probate the will of the deceased, if there be a will, appoint the administrator, look after the estate with an overruling eye of superintendency in its management, disposition, distribution, settlement and adjustment. It appoints guardians for minors or other persons who are under disability, examines and approves or rejects the reports of the executor, administrator or guardian, and makes such orders as are requisite and necessary, all the time keeping in view the will of the testator, if there be one, governing itself by its directions; and if no will, then the will of the law, made to be what it is supposed was the will of the deceased, and adopted by him.[2] It gives temporary support to the widow and minor

das, 3 T. R. 129; Devlin v. Com. 101 Pa. St. 273; 47 Am. Rep. 710."

[1] Roderigas v. Sav. Inst. 63 N. Y. 460.

[2] So far as the will itself is concerned, the jurisdiction of the probate court is exclusive only as to the probating of it. An original action may be brought in another court of general original jurisdiction to set aside the will. Ostrom v. Curtis, 1 Cush. 461; Leighton v. Orr, 44 Iowa, 679; Barker v. Barker, 14 Wis. 131; Cummings v. Cummings, 123 Mass. 270. The probate court or court to which general probate jurisdiction is confided has exclusive jurisdiction over the appointment of administrators to carry

children, in proportion to the value of the estate, sets apart the homestead and exempt property, assigns dower, fixes curtesy, and in short does all things ordinarily necessary to the settlement of the estate, where the estate is in its simple form and not left in entanglement by other conditions, involving litigation which must be determined by some other jurisdiction, as hereinafter referred to.

§ 126. Its capacity as a court.— Probate courts have been said to be courts of inferior[1] and limited jurisdiction,[2] because

a will into effect; also, over the direction of such in the discharge of their duties and settlement of their accounts and to order final distribution. Auguisola v. Arnaz, 51 Cal. 435. Also, exclusive jurisdiction of the settlement of guardians' accounts, which jurisdiction remains after the ward attains his majority, so far as settlement with the guardian is concerned. O'Brien v. Strang, 42 Iowa, 646; Moreland v. Lawrence, 23 Minn. 84. And until such settlement is had or the guardian has failed to account, upon being ordered by the probate court to do so, no action can be maintained upon his bond. O'Brien v. Strang, *supra*. Authority exists for the granting of letters of administration wherever there is property of the deceased liable to be administered upon. This is true even though there be no tangible property interest; as where the decedent was killed on a railroad in another state under circumstances which made the railroad company liable under the laws of that state, and which claim for the negligent killing of decedent was suable in another state, such action being of a transitory nature, the mere existence of the right to sue in the latter state authorized the granting of letters of administration in such state. Morris v. R. R. Co. 65 Iowa, 727. The court has jurisdiction of the subject-matter, and its action in making the appointment is not liable to collateral attack. Murphy, Neal & Co. v. Creighton, 45 Iowa, 179. But where the only property in the county in which administration is sought consists of real estate, over which an administrator has no control except where there are debts left unpaid after the personal estate is exhausted, and then only after an order has been made for the sale of real estate to meet such deficiency, the application for letters of administration should set forth the fact that there are such debts and that there is no personal property out of which they can be paid. Little v. Sinnett, 7 Iowa, 324. See Gary's Probate Law, secs. 14–25. The decrees of a probate court are final and conclusive. For an exhaustive case on probate jurisdiction, see McArthur v. Scott, 113 U. S. 340. Ellis v. Davis, 109 U. S. 485.

[1] Gary's Probate Law, sec. 2; Riggs v. Cragg, 89 N. Y. 487; Woerner's Law of Administration, secs. 142, 143.

[2] Gary's Probate law, secs. 2, 14–25; Woerner's Law of Administration, secs. 142, 143. It is said in Riggs v. Cragg, 89 N. Y. 489: "The proceeding in question was not an action in equity, but a proceeding before a surrogate's court, a tribunal of peculiar and limited jurisdiction, which can exercise only the powers prescribed by the statute and such incidental

their powers are conferred by statute. In some states the validity of their judgments has been made to depend upon the affirmative appearance upon the record of the facts upon which they were rested, it having been held that the record must show affirmatively that the preliminary requisites for exercising power have been complied with.[1] This view, however, is unsound, because it ignores the character of these important tribunals as courts of general jurisdiction over the subject-matters on which they are empowered to act, as well as the necessity for their decrees being binding upon the world.[2]

powers as are requisite to the execution of the powers expressly given, or to the attainment of justice in the particular cases to which its jurisdiction extends (citing a number of authorities). Unless a warrant for the jurisdiction exercised by the surrogate in the case can be found in the statute, either expressly or by implication, the whole proceedings are void." See, also, Theller v. Such, 57 Cal. 447.

[1] Woerner's Law of Administration, secs. 142, 143.

[2] The doctrine of the text was established early in American jurisprudence. See Grignon's Lessee v. Astor, 2 How. (U. S.) 340, where the United States supreme court say: "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence. . . . These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction; they are not inferior courts in the technical sense of the term, because an appeal lies from their decisions. That applies to 'courts of special and limited jurisdiction, which are created on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction.'" At an early day the supreme court of Massachusetts said, in Peters v. Peters, 8 Cush. 539: "But in our view the court of probate, like the ecclesiastical courts of Great Britain, to which it has constant reference, is a court of peculiar jurisdiction, having a separate and exclusive jurisdiction over an important class of subjects, particularly wills, administrations and the settlements of the estates of deceased persons." See, also, Adams v. Adams, 22 Vt. 58: "It was clearly the intention of our legislature from the first to give entire jurisdiction of settlement of estates to the probate courts in the same manner and to the same extent that the jurisdiction of other matters of contract or tort, *inter vivos*, was given to the common-law courts." Also the Illinois court in Probst v. Meadows, 13 Ill. 168, 169: "The county court, although of limited, is not, strictly speaking, of inferior, and certainly is not a court of special, jurisdiction. It is a court of record, and has a general jurisdiction of un-

The American court of probate is entitled to the same respect and presumption of conclusiveness as to the regularity of its proceedings as any court of record. It has complete jurisdiction over the matter intrusted to its charge; and when its jurisdiction appears, the recital of facts upon which it rests is no more essential than it is in the case of a federal court. It is fast becoming the settled law of this country that when a court vested with jurisdiction of the subject-matter, though it is not a court of record, acquires jurisdiction of the parties, the same presumption of regularity is due it as in the case of courts of record.[1] In fact, in nearly all the states, the court of probate is a court of record, having a clerk and seal, and, as such, a part of the judicial power of the states, as much as any other court of general jurisdiction.[2]

§ 127. Powers recited — Enforcement of its judgments. A probate court has power to punish for contempt for disobedience of its writs, process, decrees and orders.[3] Its judgments are usually enforceable by the same means as ordinary judg-

limited extent over a particular class of subjects; and when acting within that sphere its jurisdiction is as general as that of the circuit court. When, therefore, it is adjudicating upon the administration of estates over which it has a general jurisdiction, as liberal intendments will be granted in its favor as would be extended to the proceedings of the circuit court; and it is not necessary that all the facts and circumstances which justify its action should affirmatively appear upon the face of its proceedings." See, further, Batchelder v. Batchelder, 20 Wis. 452; Appeal of Schaeffner, 41 Wis. 260; Jacobs v. Fouse, 23 Minn. 551; People v. Wayne, etc. 11 Mich. 393. The same doctrine still prevails. Brotzman's Appeal, 119 Pa. St. 656, where the court say: "The fifty-ninth section of the act of 1834 gives a complete remedy in the orphans' court, and was evidently intended to exclude every other remedy and jurisdiction." See. also, Pierce v. Livingston, 80 Pa. St. 99; Covert v. Sebern et al. 73 Iowa, 569, 570; Lees v. Wetmore, 58 Iowa, 170; In re Estate of Seaton, 58 Iowa, 523; Edwards v. Cobb, 95 N. C. 4; Re McIntire, 5 Mackey (D. C.), 293; Thaw v. Ritchie, 5 Mackey (D. C.), 200; Pelham v. Murray, 64 Tex. 477; Hoagland v. See, 40 N. J. Eq. 469; Guthman v. Guthman, 18 Neb. 98; Wilkinson v. Stuart, 74 Ala. 198; Hood v. Hood, 2 Demarest (N. Y.), 583; Franks v. Chapman, 60 Tex. 46; 61 Tex. 576; Mitchell v. Rogers, 40 Ark. 91; Peters v. Clendenin, 12 Mo. App. 521; Winch v. Tobin, 107 Ill. 212; Wernse v. McPike, 76 Mo. 249.

[1] See Grignon's Lessees v. Astor, 2 How. (U. S.) 319, and other cases cited in note 2, p. 341; Culbertson v. Witbeck Co., 127 U. S, 333.

[2] See cases cited in note 2, p. 341.

[3] See Gary's Probate Law, secs. 53-4, and *ante*, § 116.

ments of courts of record;[1] and are equally as conclusive upon the parties to the record, until reversed or annulled by writ of error, *certiorari* or appeal, or direct proceedings in chancery, as the judgments of any other court. If, however, the want of jurisdiction appears from the record, or is otherwise shown, its records stand like unto the records of all other courts, void from the beginning, or from the time when the illegality destroyed the jurisdiction. Its jurisdiction over the subject-matter and parties is tested by the authorized extent of its power to hear, try, determine and enter the proper judgment, the same as that of any common-law court, and its findings are equally as conclusive within the scope of its power.[2] It may therefore be said of this court, that when the subject-matter and the parties are shown to be within its jurisdiction, and the record or proceedings show that the elementary and essential facts brought the parties within its control, its decrees stand on the same footing as those of courts of record, and are in all respects as conclusive and final as those of such courts; and the appearance of errors in its proceedings, not amounting to illegality, destroying the power to proceed, cannot be urged in a collateral or direct attack, nor by appeal or writ of error, any more successfully than as though such errors crept into the proceedings of any other court of general jurisdiction.[3]

[1] An inherent power. See chapter 1.

[2] Comstock v. Crawford, 3 Wall. 396. Hall v. Law, 102 U. S. 464: "The recitals in the order show a compliance with the statute; they show jurisdiction in the court over the subject. That jurisdiction arises upon the presentation of the application, accompanied with proper proof of previous notice of it. The order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral attack. It can only be questioned, on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review it. Voorhees v. Bank of U. S. 10 Pet. 449; Thompson v. Tolmie, 2 id. 157; Comstock v. Crawford, 3 Wall. 396. . . . The distinction between erroneous and void orders and judgments is too familiar to call for extended observation, and is fully recognized, not only in the courts of Indiana, but in those of every state in the Union. Horner v. Doe, 1 Ind. 130; Doe v. Smith, id. 451; Doe v. Harvey, 3 id. 104; Ashley v. Laird, 14 id. 222; Cox v. Mathews, 17 id. 367; Evans v. Ashby, 22 id. 15; Waltz v. Borroway, 25 id. 380; Hawkins v. Hawkins, 28 id. 67; Comparet v. Hanna, 34 id. 74; Gavin v. Graydon, 41 id. 559; Burk v. Hill, 55 id. 419; Hays v. Ford, id. 52; Hunter v. Burnsville Turnpike Co. 56 id. 218; Wiley v. Pavey, 61 id. 457." See Mohr v. Manierre, 101 U. S. 424–5.

[3] See above; also see proceedings *in*

§ 128. Must respect its own judgments — Power over.— The probate court has power over its own judgments, orders and decrees during the term in which they are rendered; but when that term has expired such orders are to be respected by it as much as though made by any other court.[1] If its order, judgment or decree is void for want of jurisdiction apparent on the record or made to appear, it may vacate the order upon the proper application, or set it aside.[2] It may also revoke letters of administration improperly granted because of fraud or for other proper reasons made apparent of record to the court.[3] It may open decrees formerly rendered so as to charge the administrator with advancements or assets omitted from the report or not made to appear in decrees, where either fraud, surprise or mistake is shown; any corrections may be made at the same term the error occurs, the order was made, or judgment rendered; but at a subsequent term it may act only on notice to the parties under a proceeding for the correction of the errors, upon their being made apparent of record, in the manner usually provided for by statute.[4] The rules of proceeding governing this court are usually similar to those governing other courts. The reader should observe that its powers, being fixed by statute, the practice therein should conform to the statute.

§ 129. Proceedings in probate are in rem.— Probate proceedings are usually regarded as being *in rem*. The death of the decedent gives a ground for the jurisdiction of the court over the estate in the proper county or district. The presenta-

rem on subject of Probate Jurisdiction.

[1] The probate court has power to correct its records so as to make them speak the truth after entry of order, after formal decree and until the judgment of the lower court is merged in the judgment of the appellate court. Ex parte Henderson, 84 Ala. 36; Brunson v. Burnett, 2 Pin. (Wis.) 185; In re Fisher, 15 Wis. 511; Farrington v. Wilson, 29 Wis. 388; Rottmann v. Schmucker, 94 Mo. 189.

[2] Blodgett v. Hitt, 29 Wis. 169; Betts v. Shotton, 27 Wis. 667; State v. Probate Court, 19 Minn. 117; Rottmann v. Schmucker, 94 Mo. 189; Pew v. Hastings, 1 Barb. Ch. 452; In re Verplanck, 91 N. Y. 450; Johnson's Appeal, 114 Pa. St. 132.

[3] See In re Broderick's Will, 21 Wall. 503; In re Paige, 62 Barb. 476; Campbell v. Logan, 2 Bradford's Sur. 90; Rottmann v. Schmucker, 94 Mo. 189; Gary's Probate Law, secs. 41, 267, 299, 300, 304.

[4] Holden v. Meadows, 31 Wis. 284; People v. White, 11 Ill. 341; Ashlock v. Sherman, 56 Iowa, 311; Rottmann v. Schmucker, 94 Mo. 189. See note 1 above.

tion of the will for probate is usually followed by a notice to the world of the time fixed for its being probated; and this notice brings every one before the court.[1] The will probated, the parties are in court; the executor is an officer of the court, and jurisdiction over the estate and subject-matter is acquired. If the case is one where the decedent died intestate, the petition for or application for administration, the appointment and notice to the world brings before the court creditors, heirs, and all others interested.

The personal property vests in the administrator, and while the real estate vests in the heirs in fee that vesting is subject to the disposition thereof for the payment of debts; for the right of the heirs to the property, in all cases where the statute provides that the real estate may be sold for the payment of debts, must be subject to a statutory claim in the nature of a lien that is given to the creditor for the payment of debts before the distribution of the estate under the law.[2] At common law the real estate descended directly to the heir, but subject to the debts of the testator, and the administrator had no control over the same.[3] But under the statutes of most of the states the real estate descends to the heirs subject to a trust created by statute for the payment of debts filed and proved against the estate, and the heir only takes by inheritance after such payment. Therefore, the probate court takes jurisdiction over the estate by and through the right of the administrator as its officer to take, sell, sequestrate and dispose of the said real estate lying within the jurisdiction of the court; and this right is primary, and the heir taking by inheritance takes subject to such disposition; and such right is as certain and effectual, and places the *res* as fully under the jurisdiction of the court, as though there was a lien created by judgment.[4]

[1] The appointment of an administrator is in the nature of a proceeding *in rem*, and all the world is estopped by an adjudication thereon. Holmes v. Or. & Cal. R. R. Co. 7 Sawyer, C. C. 380. See chapter on Proceedings in rem, § 58, n. 1, p. 161, §§ 59*a*, 64, 65, 66 and 68; Gary's Probate Law, sec. 85; Grignon's Lessee v. Astor, 2 How. (U. S.) 320.

[2] Gary's Probate Law, sec. 469; Watkinson v. Holman, 16 Pet. 25; Renner v. Ross, 111 Ind. 269; Roberts v. Bartlett, 26 Mo. App. 611; Bishop v. O'Conner, 69 Ill. 481; Personette v. Johnson, 40 N. J. Eq. 173; Chapter on Proceedings in rem, §§ 59, 60, 64 and 66.

[3] Gary's Probate Law, secs. 475-6.

[4] Gary's Probate Law, secs. 475-6;

§ 130. Scope of the jurisdiction.—The jurisdiction of the probate court should, and ordinarily does, extend to all matters necessarily involved in the disposition of the estate of the decedent.[1] However, it may be said that such jurisdiction does not extend to all contingencies that may arise, for if it

Austin v. Bailey, 37 Vt. 219; Hutchinson v. Lemcke, 107 Ind. 121; *ante*, § 66.

[1] In Riggs v. Cragg, 89 N. Y. 492, the court say: "It is doubtless true that a surrogate has no general jurisdiction in the construction of wills. But where the right to a legacy depends upon a question of construction, which must be determined before a decree for distribution can be made, the surrogate has, we think, jurisdiction under the broad grant of power conferred by section 71 upon a final accounting where all parties interested are before the court, to determine such construction as incident to the authority to make distribution. There are many cases in this court on appeals from the decisions of surrogates on final accountings which involved the interpretation and construction of wills, and no question was made by counsel or suggested by the court that the surrogate had no power to construe a will when necessary to the accounting and distribution." See, also, In re, etc. Verplanck, 91 N. Y. 450; Purdy v. Hayt, 92 N. Y. 446; Hyland v. Baxter, 98 N. Y. 610; Gary's Probate Law, sec. 23; Peters v. Peters, 8 Cush. 529; Stearns v. Wright, 51 N. H. 609. In Vermont it has always been held that courts of probate have as much the exclusive jurisdiction of matters coming properly within their cognizance as any other courts of law. Redfield, J., in Adams v. Adams, 22 Vt. 50, 58: "They have general jurisdiction over a particular class of cases. It is a limited but not an inferior jurisdiction." Propst v. Meadows, 13 Ill. 157; Batchelder v. Batchelder, 20 Wis. 452; People v. Wayne Circ. Ct. 11 Mich. 393; Jacobs v. Fouse, 23 Minn. 51. Riggs v. Cragg, 89 N. Y. 492: "In support of the objection to this jurisdiction the case of Bevan v. Cooper, 72 N. Y. 317, is relied upon, in which the point decided was that a surrogate had no jurisdiction to determine the question whether certain legacies given by the will in that case were charged upon real estate. The question was not, as far as appears, involved in the accounting, and was not necessary to be determined by the surrogate as incident to the accounting or distribution. The surrogate could not enforce the payment of the legacies out of the land, and, as was said in the opinion, his decree adjudging the lien claimed would be *brutum fulmen*." The court then use the language quoted at the beginning of this note, and cite "Stagg v. Jackson, 1 N. Y. 206; N. Y. Institution v. How's Ex'rs, 10 id. 84; Parsons v. Lyman, 20 id. 103; McNaughton v. McNaughton, 34 id. 201; Bascom v. Albertson, 34 id. 584; Whitson v. Whitson, 53 id. 479; Cushman v. Horton, 59 id. 149; Hoppock v. Tucker, id. 202; Teed v. Morton, 60 id. 502; Lawrence v. Lindsay, 68 id. 108; Luce v. Dunham, 69 id. 36; Wheeler v. Ruthven, 74 id. 428; Ferrer v. Pyne, 81 N. Y. 281. But for the reason that the jurisdiction of the surrogate is limited and special, and that he could not in the proceeding under review determine the question as to the right to the fund in controversy, the judgment below

did it would embrace very intricate questions indeed; for there may be equitable liens, mortgages, trusts, charges, the winding up of partnerships and corporations, the rights of creditors, of heirs, assignees, assignments by legatees, devisees and distributees, embracing actions in every form and variety known to the law and chancery courts. Such jurisdiction, if conferred, would greatly hinder and delay the court in the settlement and disposition of the estate; and it is therefore usually given to other courts; no probate court is given such large power. When probate jurisdiction is given to a court of general law and equity jurisdiction, such court under its law and equity powers may settle these questions, but they do not belong to its probate powers alone. In some states — New York, for example — the probate jurisdiction is very limited; while in Pennsylvania and Iowa the powers of the court are greatly extended, being almost, I may say quite, unlimited, or at least sufficiently broad to meet all the demands of justice.[1] The practitioner should closely examine the statute, and look to the extent of the power bestowed upon the court. The powers usually granted relate to the probating of wills, appointment of administrators, executors, guardians, allowance of claims; directing the sale of personal and real property as necessity may require; supervising the accounts of executors, and the court's appointees, administrators and guardians, and making settlements with them; distributing the estate, assigning dower, making allowances for the support of the minor heirs and widow; compelling an accounting by the administrator or executor for waste; setting apart homestead rights; distributing legacies,— and in short closing the estate in as speedy a business way as possible.[2]

It may be remarked that the jurisdiction of the probate court partakes largely of chancery powers, and where the statute is silent it is sometimes necessary to look to the principles and practice in that court for a guide.[3] The tendency

should be reversed." McArthur v. Scott, 113 U. S. 403; Fiester v. Shepard, 92 N. Y. 251.

[1] Bevan v. Cooper, 72 N. Y. 317; In re Telden, 98 N. Y. 434; Johnson's Appeal, 114 Pa. St. 132; Lowry's Appeal, 114 Pa. St. 219; Appeal of Miskimmns, 114 Pa. St. 530.

[2] Wood v. Stone, 39 N. H. 574.

[3] Bradstreet v. Bradstreet, 64 Me. 209; Higbee v. Bacon, 11 Pick. 423. See note 2 above.

of modern legislation is to increase the powers of these courts, by giving them much of the jurisdiction exercised in chancery over matters arising out of and incidental to wills and their probate, and the administration and settlement of estates, and placing the courts in better hands.[1]

§ 131. The venue of primary probate jurisdiction.— Jurisdiction for the purpose of probating a will or granting letters of administration, and doing everything pertaining to the settlement of estates, is exclusively within the probate court of the district or county in which the decedent was domiciled at the time of his death.[2] So inflexible is this rule that the will of a deceased person cannot be used in evidence to affect his personal property in any court of law or equity until it has been proved and allowed in the proper probate court.[3] The sole exception to the rule stated is in an action

[1] The policy of thus extending the jurisdiction of these courts as at present organized might be questioned. In England, where the whole system has been recently reorganized, though the probate is made *prima facie* evidence of wills of real estate, much of the former jurisdiction of the ecclesiastical courts is transferred to the court of equity and excluded from the jurisdiction of the court of probate. It controls the administration of estates, but not the distribution, and does not combine the judicial and merely ministerial functions in the same officer as in Wisconsin and some other states. In most of the New England states a register is the ministerial officer of the probate courts. In New York, as in Minnesota, a clerk may be authorized to perform certain ministerial acts.

[2] Redfield on Wills, sec. II, par. 1. This general rule is of such universal acceptance in all the American states as scarcely to require any authority in its confirmation. Of such unqualified extent is this rule that a will cannot be used as evidence affecting the title of personalty in any court of common law or equity, until it has been proved and allowed in the probate court, with the single exception of a bill in equity against the heirs and executors for a fraudulent suppression of the will as before stated. See next note.

[3] Redfield on Wills, sec. II, par. 1. Wharton's Law of Evidence, sec. 66: "The probate of a will is a copy of the will under the seal of the probate court, with 'a certificate stating that the original will has been duly proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein.' Without this proof, the will itself, as a title to property, or as giving a right to the executor or administrator to sue, cannot be received in evidence. The probate may be proved either by producing the document itself, or the register from the court of probate containing an entry that the will has been proved and probate granted, or a certified or examined copy of such register. Under local statutes this admissibility extends to certified copies of wills and pro-

in equity against the heirs and executors for the fraudulent suppression of the will.[1] No executor or other person can justify an intermeddling with the estate; any act toward a settlement of it must be authorized by letters testamentary or of administration from the probate court having jurisdiction. This should be limited, however, so as to except three acts: Providing for the burial of the deceased, gathering and preserving his effects, and supporting his family until letters can be obtained.[2] These acts, however, with all other valid ones, will, on the granting of letters of administration, or testamentary, be rendered valid by issuing them; they relate back to the date of the death of the deceased. This rule is so conclusive that where the executor brings suit at law in his name as executor of the estate, or appears in court to defend an action pending on the death of the decedent, before the probate of the will, his acts will be rendered valid from the beginning.[3]

The authority of an executor or administrator is limited to the state in which his letters are granted, and beyond that border he cannot act in his official capacity, or bring suit, un-

bates registered in other states. But the probate must be included in the certificate. At common law, a foreign will, which is not admitted to probate by the law of the forum, must be proved by producing the will, if it is in existence; if it be lost, by proving a copy. When a probate in one state is offered in evidence, the record is *prima facie* proof of its allegations." Jones v. Godrich, 5 Moo. P. C. 16; Allen v. Dundas, 3 T. R. 125; Ryves v. Wellington, 9 Beav. 579; Hood v. Barrington, L. R. 6 Eq. 218; Graham v. Whitely, 26 N. J. L. 254; Cogswell v. Burtis, 1 Hoff. (N. Y.) 198. See Doe v. Gunning, 7 Ad. & E. 244; Taylor's Evidence, sec. 1427; R. v. Philpot, 2 Den. 302; Dorrett v. Meux, 15 C. B. 142; Fleeger v. Pool, 1 McLean, 185; Ackley v. Dygert, 33 Barb. 176; Kenyon v. Stewart, 44 Pa. St. 179; Raborg v. Hammond, 2 Har. & G. 42; Taylor v. Burnsides, 1 Gratt. 165; Wynn v. Harman, 5 Gratt. 157; Rowland v. M'Gee, 4 Bibb, 439; McConnell v. Brown, Litt. Sel. Cas. (Ky.) 459; Churchill v. Corker, 25 Ga. 479; Doe v. Roe, 31 Ga. 593; Morris v. Keyes, 1 Hill (N. Y.), 540; Nichols v. Romaine, 3 Abb. Pr. 122; Marr v. Gilliam, 1 Coldw. 488; Bright v. White, 8 Mo. 422; Graham v. Whitely, 26 N. J. L. 254.

[1] Redfield on Wills, sec. II, par. 1; Tucker v. Phipps, 3 Atk. 360; Mead v. Heirs of Langdon, cited in 22 Vt. 59; Buchanan v. Matlock, 8 Humph. 390.

[2] Redfield on Wills, sec. II, pars. 2 and 3; Emery v. Berry, 8 Foster, 473; Bacon v. Parker, 12 Conn. 212; Mitchel v. Lunt, 4 Mass. 658; Bennett v. Ives, 30 Conn. 329.

[3] Redfield on Wills, sec. II, par. 4; Smith v. Guild, 34 Me. 443.

less expressly authorized by statute.[1] There is, however, this exception to the rule: that where personal property of the deceased was in the state where the letters were granted, at the time of his death, the executor or administrator may bring an action in his own name, where it has been wrongfully carried out of the jurisdiction by a trespasser, or where the administrator, if the property be a chose in action, has reduced it to possession, an action will lie for its recovery; so, also, an action will lie for an injury to the property, if injured in the state where the letters were taken out, even if suit is brought in a foreign state, the right of action having accrued to him; and it seems he may collect, although he never had possession of the note and it was not in the state at any time after the death of decedent.[2] The state in which the personal

[1] Wilkins v. Ellett, 9 Wall. 742; Wyman v. Halstead, 109 U. S. 656; Pinney v. McGregory, 102 Mass. 186. See *ante*, ch. 8, § 66; Dickinson v. Seaver, 44 Mich. 629; McNamara v. McNamara, 62 Ga. 203.

[2] Wyman v. Halstead, 109 U. S. 656: "The general rule of law is well settled that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable. Yeomans v. Bradshaw, Carth. 373; S. C. Comb. 392; Holt, 42; 3 Salk. 70, 164; Abinger, C. B., in Attorney-General v. Bouwens, 4 M. & W. 171, 191; S. C. 1 Horn & Hurlstone, 319, 324; Parke, B., in Mondel v. Steele, 1 Dowl. (N. S.) 155, 157; Slocum v. Sanford, 2 Conn. 533; Chapman v. Fish, 6 Hill, 554; Owen v. Miller, 10 Ohio St. 136; Pinney v. McGregory, 102 Mass. 186. An administrator is, of course, obliged to demand payment at the place where the bill or note is payable; and he may find difficulty, unless it is payable to bearer, in suing upon it in a place in which he has not taken out administration. But payment to the administrator appointed in the state in which the intestate had his domicile at the time of his death, whether made within or without that state, is good against any administrator appointed elsewhere. Wilkins v. Ellett, 9 Wall. 740, and 108 U. S. 256." Stacy v. Thrasher, 6 How. 58: "The question presented by the demurrer is whether the judgment against Ann Lee, administratrix of Charles S. Lee in Mississippi, is evidence by itself, sufficient to entitle the plaintiff to recover against Stacy, the administrator of the same intestate in Louisiana. Or, to state the point disconnected with the accidents of the case, Will an action of debt lie against an administrator in one of these United States, on a judgment obtained against a different administrator of the same intestate appointed under the authority of another?

property of a non-resident may be has jurisdiction — known as ancillary — to grant administration of the estate; the jurisdiction arising from the fact that the decedent's property is within the state. So, also, if there is real estate in the foreign

. . . The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and incumbered with the duty to pay his debts, he is considered in law as in privity with him, and, therefore, bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction. He cannot, therefore, do any act to affect assets in another jurisdiction, as his authority cannot be more extensive than that of the government from whom he received it. The courts of another state will not acknowledge him as a representative of the deceased, or notice his letters of administration. See Tourton v. Flower, 3 P. Wms. 369; Borden v. Borden, 5 Mass. 67; Pond v. Makepeace, 2 Met. 114; Chapman v. Fish, 6 Hill, 554, etc. It follows as a necessary inference from these well-established principles, 'that where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator.' See Story, Confl. of Laws, sec. 522; Brodie v. Bickley, 2 Rawle, 431. The same doctrine is recognized in the case of Aspden v. Nixon, 4 How. 467, by this court." Redfield on Wills, sec. 2, par. 6; Chamberlin v. Wilson, 45 Iowa, 149; Greasons v. Davis, 9 Iowa, 219. Bull v. Fuller, 78 Iowa, 23 (Granger, J.): "Under the foregoing statement, it will be observed that administration is being had on the estate of Mrs. Hurlbut both in New York and Vermont, and that both administrations are claimed as original, with disputed rights as to the proceeds of the note in suit. The arguments in the case would lead us to determine the dispute as between the respective representatives, not that the administrator in Vermont is a party here, but the argument proceeds upon the theory that there is but one rightful recipient of the proceeds of the note, and if payment is made to another it is no discharge of the debt. We are not disposed to consider the question of the validity of the appointment of the plaintiff as executor in New York, for we think the case may be disposed of consistently with the validity of both appointments, and we are by no means prepared to say that original administration may not be granted in two states upon the same estate. It is true that Mrs. Hurlbut died in Vermont, and we do not understand appellant to contend but that, as to property other than the note in suit, the administrator in Vermont is the rightful custodian; and as to this note, the claim for administration in New York is based upon the fact that at the time of Mrs. Hurlbut's death the note was there. It is a question of some doubt if the mere presence of a note in a state other than the residence of the deceased owner would justify administration

state, and not sufficient personal property to pay debts; and the law of the *rei sitæ* governs in such cases.[1]

It has been held, however, and it is beyond doubt the correct rule of law, that an administrator may sell the notes of

there. It is nearer in harmony with the authorities that the residence of the debtor is the property *situs* to justify such proceedings. Wyman v. Halstead, 109 U. S. 654. . . . With the fact established that administration in Vermont is authorized, and defendant paid the note there before administrative proceedings were adopted in New York, we think the question is clearly settled upon authority. In the case of Wilkins v. Ellett, 108 U. S. 256, the syllabus was prepared by the judge who wrote the opinion, and is as follows: 'When a debt due to a deceased person is voluntarily paid by the debtor at his own domicile, in a state in which no administration has been taken out, and in which no creditors or next of kin reside, to an administrator appointed in another state, and the sum paid is inventoried and accounted for by him in that state, the payment is good as against an administrator afterwards appointed in the state in which the payment is made, although this is the state of the domicile of the deceased.' That case is stronger against appellant than the case at bar, as, in that case, the debtor went from the domicile of the deceased and paid the debt, while in this he went to the domicile and made the payment. The court, in the opinion, uses this language: 'If a debtor, residing in another state, comes into the state in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere.' The significance of this language is much aided by the fact that the case is one between administrators of the same estate, deriving their authority from appointments in different states, which for practical purposes is the *status* of this case." Stevens v. Gaylord, 11 Mass. 256.

[1] Redfield on Wills, sec. 2, par. 8. Lees v. Wetmore, 58 Iowa, 176: "An executor is charged with the duty of carrying out the directions of the will under the restriction imposed by law. If the one named in the will does not accept the appointment and qualify, as required by law, the court of probate appoints another to take his place. Rev. sec. 2335. The executor thus appointed is charged with the duty of carrying out the directions of the will. His powers are not different from those which would have been possessed by the executor named in the will had he accepted the trust. A will proved in another state is admitted to probate here upon the record of its original probate. If the executor named therein does not qualify another is appointed by the proper court. Rev. secs. 2328–2331. An executor of a foreign will, so appointed, is charged with the like duties and possesses the like powers as an executor of a will originally admitted to probate in this state. Under these rules, the sale of the land in question by Mitchell was made in the exercise of his power as an executor, not as a trustee. And this power was not delegated by the executors named in the will, but was conferred by the law under his appointment as executor by the probate court of Polk county. It is argued that the probate of the will and the appointment of Mitchell as executor of Walker's estate is void, for the

the deceased, coming into his possession as administrator, and the purchaser may maintain an action on them in his own name against the debtor of another state; or, if he sells a chose in action, and the law of the state where the suit is brought permits such an assignment, the assignee may maintain an action in his own name,[1] and the administrator may

reason that Walker was not a resident of Polk county, and had no property therein. But administration may be granted upon the estate of a non-resident, if he leaves property in the county. Rev. sec. 2304. The evidence shows that at the time the will was admitted to probate, and Mitchell was appointed executor, certain notes were held in Polk county that were the property of Walker's estate. It is also shown that these notes were enforced against the estate of White. Upon the petition for the appointment of the executor, the court had jurisdiction of the question whether there was property of Walker within the county. By making the appointment of the executor the court found that such property was within the county. This adjudication cannot be collaterally assailed. Murphy v. Creighton, 45 Iowa, 179. Upon granting administration of the estate the court acquired jurisdiction of the land in Guthrie county. Rev. sec. 2472. In Christy v. Vest, 36 Iowa, 285, no property belonging to the state was found in the county where administration was granted. In this respect it differs from the case before us, and does not, therefore, support the position of defendants' counsel." But see Newton v. Bronson, 13 N. Y. 593; Williams v. Storrs, 6 Johns. Ch. 356; Rand v. Hubbard, 4 Met. 255; Hutchins v. State Bank, 12 Met. 421; Mackey v. Coxe, 18 How. 104; Klein v. French, 57 Miss. 667. Examine Huthwaite v. Phaire, 1 Man. & G. 162.

[1] Redfield on Wills, ch. 8. par. 2, sec. 14; Luce v. M. & L. R. R. Co. 63 N. H. 588. Marshall Co. v. Hanna, 57 Iowa, 374: "It is insisted that the administrator had no authority to assign the notes and due-bills. In Williams on Executors, page 932, it is said: 'It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testatator or intestate, and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is that the executor or administrator must sell, in order to perform his duty in paying debts, etc., and no one would deal with an executor or administrator if liable afterwards to be called to account.' That the administrator had authority to sign the note and bills, see Thomas v. Reister, 3 Porter (Ind.), 369; Gray v. Armistead, 6 Ired. Eq. 74; Bradshaw v. Simpson, id. 243; Hough v. Bailey, 32 Conn. 288; Makepeace v. Moore, 10 Ill. 474. In Hough v. Bailey it is said, if the administrator dispose of a note improperly, this might render him liable on his bond, but would not affect the title of his *bona fide* assignee. The defendant does not deny liability upon the notes, but pleads certain facts in abatement of the plaintiff's right of action. The burden of establishing these facts is upon the defendant. The executor had a general power to dispose of the note and due-bills. In the absence of any

maintain in a foreign state an action in his own name on a note payable to bearer, or to the deceased or bearer.[1]

§ 132. Local and ancillary administration.— While the original taking out of letters of administration and granting probate of wills belongs to the county or district where the deceased was domiciled at the time of his death, it by no means follows that they cannot be issued elsewhere. The probating of a will is a proceeding exclusively *in rem;* and when no will is left, and the deceased leaves property in a foreign state, the property gives jurisdiction and ancillary administration may be taken out because of the jurisdiction afforded by means of such property. The principal and ancillary administrations are separate and independent of each other; so much so that a judgment recovered against the representative of the estate in one state forms no estoppel or foundation for a right of action in the other.[2] When administration is taken out at the place of domicile of the deceased, and afterwards it becomes necessary to take out administration in a foreign state, this is called ancillary administration, since it is subsidiary and supplemental to the principal administration; but there can be no reason why persons indebted to the estate could not pay to the administrator appointed by the court where the deceased was domiciled and obtain a valid discharge.[3]

The deceased may have done business, and left personal property and had credits coming to him, and become liable for debts, in a state other than that of his domicile, and such state may by

showing to the contrary, it is presumed that this power was rightfully exercised. Even if the administrator transferred them improperly, still if the plaintiff took them *bona fide*, it acquired a good title, and the executor is liable upon his bond. The defendant does not show that the plaintiff did not take the evidences of indebtedness *bona fide*."

[1] Lewis v. Adams, 70 Cal. 403.

[2] Stacy, Adm'r, v. Thrasher, 6 How. 44; Lewis v. Darling, 16 How. 1; Hill v. Tucker, 13 How. 458; McLean et al. v. Meek, 18 How. 18; Borer v. Chapman, 119 U. S. 587; People's Savings Bank v. Wilcox, 15 R. I. 258. See Martin v. Gage, 147 Mass. 204; 17 Northeast. Rep. 310; McAnulty v. McClay, 16 Neb. 418; Musselman's Appeal, 101 Pa. St. 169; Stewart v. O'Donnell, 2 Dem. (N. Y.) 17; Hendrickson v. Ladd, 2 Dem. (N. Y.) 402. See *contra*, McCord v. Thompson, 92 Ind. 565.

[3] Redfield on Wills, Part II, ch. 1, sec. 1, pars. 8, 9, 10; Lussen v. Timmerman, 4 Dem. (N. Y.) 250; Patterson v. Pagan, 18 S. C. 584.

its courts grant administration based on the property jurisdiction; such administration is usually provided for by the laws of the states. So long as there are creditors in the jurisdiction of ancillary administration, it is their right to have all the assets of the estate within the jurisdiction exhausted and distributed for the payment of their claims; the residue, if any, in the hands of the ancillary administrator, may, by the court, be turned over to the principal administrator for final distribution, or the ancillary administrator, under the order of the court, may distribute such residue to the persons authorized to receive it.[1] The ancillary administrator has only power over property and credits of the deceased within his own jurisdiction; he cannot sue persons not residing within his state for money, debts or property in their hands, as has been held in some cases; but this rule is apparently relaxing. The highest national court has held that where one dies in a state not his domicile, leaving property, and administration has been taken out there, a debtor may pay a debt to the ancillary administrator so appointed, though he does not reside in the state where the ancillary administration was taken out, and makes payment at his own domicile, the money having gone into the hands of the lawful administrator, and he is not liable to the administrator appointed at the domicile of the deceased afterward.[2] It has also been held that if the debtor, residing in a foreign state, comes into the state in which the administrator is domiciled and pays the debt, the payment is valid and discharges the debt. Also, if the debtor is in the state of the domicile of the deceased, and is there sued by the administrator, and a judgment is recovered in such state against him, the administrator may bring suit in his own name upon such judgment where the debtor resides.[3]

We find that the rule appears to be that a payment in good faith to either administrator is good, where there are ad-

[1] Redfield on Wills, Part II, ch. 1, sec. 1, par. 12, and cases there cited; In re Gable's Estate, 44 N. W. Rep. (Iowa) 352; Banta v. Moore, 15 N. J. Eq. 101; Nicrosi v. Giuly, 85 Ala. 365; 5 South. Rep. 156; Re Hughes, 95 N. Y. 55.

[2] Wilkins v. Ellett, 108 U. S. 256; Bull v. Fuller, 78 Iowa, 20; Mackey v. Coxe, 18 How. 100; Sloan v. Sloan, 21 Fla. 589; Decker v. Patton, 20 Ill. App. 210.

[3] Gray's Appeals, 116 Pa. St. 262; Lewis v. Adams, 70 Cal. 403. But see Buck v. Johnson, 67 Ga. 82.

ministrators in several states, if the money goes into lawful hands.[1]

§ 132a. Mode of obtaining jurisdiction.— The mode of obtaining jurisdiction should be by written petition, though some states, Iowa for one, prescribe no steps to be taken to invoke the exercise of the judicial power of probate courts.[2] Such power should, however, be invoked by petition duly verified, which should clearly set forth jurisdictional facts: such as the residence or domicile of the deceased at the time of his death, or that he had property in the state at that time; that he died intestate if administration is sought, and show that the applicant is competent to be appointed; and if it asks the appointment of another it should be accompanied with the latter's assent to act.[3] If based on real estate alone, it should state that the deceased owed debts that must be paid. It should also state the amount and value of the personal property.[4] Notice of the appointment of an administrator is re-

[1] Gray's Appeals, 116 Pa. St. 262; Bonilla v. Mestre, 84 Hun (N. Y.), 551.

[2] Murphy v. Creighton, 45 Iowa, 182; Shipman v. Butterfield, 47 Mich. 487; Herrick & D.'s Probate Law & Pr. 144. See Robinson v. Epping, 24 Fla. 237; 4 South. Rep. 812; Holmes v. O. & C. R'y Co. 6 Sawyer C. Ct. 262; Johnston v. Smith, 25 Hun (N. Y.), 171.

[3] Schouler on Ex'rs & Adm'rs, 91; Danby v. Dawes, 81 Me. 30; 16 Atlantic Rep. 255; Lucas v. Todd, 28 Cal. 182; Minkler v. Woodruff, 12 Neb. 267. See Robinson v. Epping, 24 Fla. 237; 4 South. Rep. 812; Re Miller, 5 Dem. (N. Y.) 381. Murphy v. Creighton, 45 Iowa, 179: The probate court has jurisdiction to appoint an administrator even in a county where there is no property of deceased beyond an interest in an action at law, and its adjudication is not open to collateral attack. Where a petition is not assailed by motion, demurrer or in arrest, an objection which might have been made in either of those methods, but was not, will be deemed to have been waived. If a party with full knowledge of all the facts in the case voluntarily pays money in satisfaction or discharge of a demand unjustly made upon him, he cannot afterward allege such payment to have been made by compulsion and recover the money. Shipman v. Butterfield, 47 Mich. 487: A petition for administration of the estate of an intestate does not confer jurisdiction to appoint an administrator if it does not show that the petitioner is interested in the estate as next of kin, creditor or in some other capacity enumerated.

[4] Little v. Sinnett, 7 Iowa, 331; Temples v. Cain, 60 Miss. 478; Bishop v. Lalouette, 67 Ala. 197; Lees v. Wetmore, 58 Iowa, 170. 3 Lead. Am. Cas. in Real Property, 463: "As a general rule, the law of the country in which the land to descend is situated will govern the question of descent (McNitt v. Logan, Litt. Sel. Cas. 60; Stent v. McLeod, 2 McCord, Ch. 354; Jones v. Marable, 6 Humph. 116), and the law of the domicile of

quired in most states, but in some it is not.[1] Some states require the name and residence of the heirs to be given and

the owner cannot affect the devolution of real estate (Potter v. Titcomb, 22 Me. 300); the question so far as it bears on the effect of *status* acquired extraterritorially has been discussed in connection with the question of the effect of legitimation, and we may note that in Harvey v. Ball, 32 Ind. 98, the supreme court of Indiana declared that where descent depends upon *status* the *lex domicilii* must govern. This was, however, mere dictum, for the court allowed a person resident in Pennsylvania and illegitimate there, but who would have been legitimate in Indiana, to inherit lands in Indiana, and justified its action by holding that the Indiana statute did not merely declare a *status*, but conferred a heritable power on a person born out of wedlock whose parents afterwards married. The result, we think, was right, but the court, or rather two judges of it, for one judge dissented and another did not sit, would seem to have gone to an unnecessary amount of trouble to declare the principle that a foreign *status* would govern a case of descent, and then to take the case out of it, where to have held the broad principle that descent of land was governed by the *lex rei sitæ* would have been sufficient. In addition to land in the ordinary use of the term the following have been held to pass to the heir and by descent as real estate, or as savoring of the realty: Land warrants (Armstrong v. Campbell, 3 Yerg. 201), settlement rights (Lessee of Workman v. Gillespie, 3 Yeates, 571), a right to a land certificate under the act of congress of May 23, 1828 (Shanks v. Lucas, 4 Blackf. 476), an inchoate right afterwards perfected by a patent to the heirs (Frizzle v. Veach, 1 Dana, 211), lands located and surveyed by the ancestor although patented to the heirs (Lessee of Bond v. Swearingen, 1 Ohio, 190), an inchoate right by entry and survey (Morrison v. Campbell, 2 Rand. 206), an equitable title (Roup v. Bradner, 19 Hun, 513). A contract for the purchase of land will pass to the heir (Champion v. Brown, 6 Johns. Ch. 398; Griffith v. Beecher, 10 Barb. 432); hence the administrator of the decedent cannot assign the contract or compel its performance, but the heirs may call upon the executor or administrator to complete the contract upon the decedent's side so as to entitle the heirs to call for a conveyance. Champion v. Brown, *supra*." Story on Conflict of Laws, 538: But, be the origin of the doctrine what it may, it has so general a sanction among all civilized nations, that it may now be treated as a part of the *jus gentium*. Lord Loughborough has stated it with great clearness and force in one of his most elaborate judgments. "It is a clear proposition," said he, "not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to the law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession, or by the act of the party. It follows the law of the person. The owner in any country

[1] Davis v. Smith. 58 N. H. 16.

the value and character of the property.[1] The law should, and in many states does, require that the appointment of administrators should be on notice, and that none should be appointed unless possessed of good business qualifications and habits.

In the matter of the probate of wills the practice as to notice varies with the states, and the statutes must be consulted. In regard to nuncupative wills, where property is bequeathed *in extremis*, made by sailors and soldiers, or because of sudden sickness where no opportunity is offered for reducing them to writing, the court has jurisdiction to hear evidence, and strict proof is required of their terms.[2] It is, however, the rule that where a will is presented to the court within its jurisdiction, it may investigate it, and the filing of any written petition is unnecessary, and, if probated, this fact is sufficient.[3]

§ 133. Ancillary administration.— As has been shown, the courts of any country, acting for the sovereign, control all property within its domain. It has ever been an established principle of the common law that the property of every person within the territory of the state or sovereignty is in law technically charged with the debts of such person, wherever he may have departed this life. While the principal adminis-

may dispose of his personal property. If he dies, it is the law, not of the country in which the property is, but of the country of which he was a subject, that will regulate the succession." The same doctrine was recognized by Lord Chief Justice Abbott on another important occasion. "Personal property," said he, "has no locality. And even with respect to that, it is not correct to say that the law of England gives way to the law of the foreign country; but that it is part of the law of England that personal property should be distributed according to the *jus domicilii*." The same doctrine has been constantly maintained, both in England and America, with unbroken confidence and general unanimity. Pipon v. Pipon, Ambler, 25; Potter v. Brown, 5 East, 130; Holmes v. Remsen, 4 Johns. Ch. 460; Guier v. O'Daniel, 1 Binney, 349, note; Bruce v. Bruce, 2 Bos. & Pull. 229, note; Liverm. Diss. p. 128 to p. 132; De Sobrey v. De Laistre, 2 Harr. & Johns. 191, 224; Hunter v. Potts, 4 T. R. 182, 192; Phillips v. Hunter, 2 H. Black. 402; Goodwin v. Jones, 3 Mass. 514, 517; Blake v. Williams, 6 Pick. 286, 314; 3 Burge, Comm. on Col. and For. Law, pt. 2, ch. 20, pp. 749–753; French v. Hall, 9 N. H. 137; Cockerell v. Dickens, 3 Moore, P. C. 98, 131, 132; Black v. Zacharie, 3 How. 514; St. Louis v. Ferry Co. 11 Wall. 430; Robertson v. Pickrell, 109 U. S. 610; 22 Cent. Law J. 7–14.

[1] Libbey v. Mason, 112 N. Y. 525.

[2] Winn v. Bob, 3 Leigh (Va.), 140; Woods v. Ridley, 27 Miss. 119; Palmer v. Palmer, 2 Dana, 390; Portwood v. Hunter, 6 B. Mon. 538.

[3] Herrick & D.'s Probate Law & Pr. 52, 53.

tration is taken out at the place of the decedent's domicile, irrespective of where he died, so ancillary administration may be taken out in any state in which he had property, real or personal.[1]

Neither can the administrator or executor of the place of the deceased's domicile meddle with the estate of the decedent in a foreign state before proving the will, or prior to his appointment by the proper court.[2] Nor can the executor or administrator appointed in one state take control of property situated in another by the force of the common law or the law of the United States; to do this he must obtain authority or probate in the state and from the courts of the *situs* where the property is situated.[3] Property, as we have shown, whether movable or immovable, is subject to the laws of the state where it is situated, and the sovereign state controls it free from all foreign interference and sees that it is secured to the use of the rightful owner or his creditors. The executor or administrator must act under the control of the court of the state which grants his letters,[4] or by virtue of the stat-

[1] Fernandez's Executors, L. R. 5 Ch. App. 315; Bond v. Graham, 1 Hare, 482; Preston v. Melville, 8 Clark & F. 1; Fenwick v. Sears, 1 Cranch, 259; Armstrong v. Lear, 12 Wheat. 169; Vaughan v. Northup, 15 Pet. 1; Swatzel v. Arnold, 1 Woolw. 383; Borden v. Borden, 5 Mass. 67; Langdon v. Potter, 11 Mass. 313; Picquet, Ex parte, 5 Pick. 65; Trecothick v. Austin, 4 Mason, 16; Pond v. Makepeace, 2 Metc. 114; Riley v. Riley, 3 Day, 79; Vermilya v. Beatty, 6 Barb. 431; Webb, In re, 18 N. Y. Sup. Ct. 124; Clark v. Blackington, 110 Mass. 369; Banta v. Moore, 15 N. J. Eq. 97; Sayre v. Helme, 61 Pa. St. 299; Watson v. Pack, 3 W. Va. 154; Vickery v. Beir, 16 Mich. 50; Sheldon v. Rice, 30 Mich. 296; Rosenthal v. Renick, 44 Ill. 203; McClure v. Bates, 12 Iowa, 77; Turner v. Linam, 55 Ga. 253; Henderson v. Rost, 15 La. Ann. 405; Burbank v. Payne, 17 La. Ann. 15; Riley v. Moseley, 44 Miss. 37; Anderson v. Gregg, 44 Miss. 170; Rucks v. Taylor, 49 Miss. 552; Morton v. Hatch, 54 Mo. 408; Apperson v. Bolton, 29 Ark. 418; Rutherford v. Clark, 4 Bush (Ky.), 27.

[2] Clopton v. Booker, 27 Ark. 482; Arthur v. Hughes, 4 Beav. 506; Taylor v. Benham, 5 How. (U. S.) 233; Campbell v. Tousey, 7 Cow. 67, and cases cited in last note.

[3] See note above. Wharton, Confl. Laws, sec. 311: "The rule of international law may be thus stated: Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit, or following the owner's person, are governed by the *lex situs*, though in some jurisdictions an exception may be made in cases where all the parties, being subject to a common domicile, are held to be bound by the laws of that domicile."

[4] Wharton, Confl. of Laws, sec. 605:

utes of the state in which the property is situate. This rule is based on the protection of the citizens of the state; for, were it not so, the creditors residing therein would be forced to go to a foreign jurisdiction to file their claims; and inasmuch as the debts, to a certain extent, were contracted on the strength of the credit given to the property in the state, it would be unjust to permit the property to be removed to a foreign jurisdiction, or to send creditors there to obtain their rights. It is true that a foreign executor or administrator must be appointed in the jurisdiction where the property of the non-resident decedent is before he can bring suit as such; but the rule is now almost universal that the executor or administrator of the domicile of the deceased will be recognized by the courts of England and the United States as a person to whom ancillary administration will be granted, upon sufficient and proper security being tendered to the probate court of the state empowering him to act as ancillary administrator in such jurisdiction and administer upon the effects there situate.[1] So far as local assets are concerned he acts under the

"The sovereign is guardian of all property within his bounds, as he alone can protect such property from foreign invasion; so it is his duty to see that its use is secured to the proper owner. Hence, those who meddle with it, when occupancy has been closed by death, must first obtain his sanction and act under his control. . . . An administrator (and the same remark applies to an executor) acts under the control of the sovereign from whom he takes out letters; he is therefore the officer of such sovereign, and cannot be permitted, as such, to exercise his office in another sovereignty."

[1] Foote, Priv. Int. Jur. p. 199; Price v. Dewhurst, 4 M. & Craig, 76; Earl, Goods of, L. R. 1 P. & D. 450; Hill, Goods of, L. R. 2 P. & D. 89; Campbell v. Sheldon, 13 Pick. 8; Campbell v. Wallace, 10 Gray, 162; Swatzel v. Arnold, 1 Woolw. 383; Ela v. Edwards, 13 Allen, 48; Lynes v. Coley, 1 Redfield (N. Y.), 405. Parker's Appeal, 61 Pa. St. 480: "The principle which controls this case is clearly announced by Gibson, C. J., in Mothland v. Wireman, 3 Penn. Rep. 188, in these words: 'An administrator here, though admitted to be but auxiliary to the administrator at the place where the decedent was domiciled, is bound to remit the assets to be administered there, only in case there are no domestic claimants in the character of creditors, legatees or next of kin, but that where these appear, the assets are to be retained for administration, according to our own laws.' The question has been considered in a number of cases, there being, generally, two sets of administrators, one of them being called the administrator *domicilii*, the principal and the primary administrator, and the other being variously styled the administrator of the *situs*, the ancillary and the auxiliary adminis-

direction of the courts of the *situs;* hence the rule of territorial supremacy is not invaded, and international harmony in the distribution of the estate is maintained; and this is the English rule and practice, to permit the domiciliary administrator. But as Lewis, J., aptly said, in his learned opinion (Dent's Appeal, 10 Harris, 519), 'It does not matter what terms are used to designate the distinction in fact, as to the objects of the different administrations, so that we guard ourselves against the conclusion that there is a distinction in law as to the rights of the parties entitled as distributees.' And as was said in Harvey v. Richards, 1 Mason, 381: 'There is no magic in words, and each of these administrations may properly be considered as a principal one, with reference to the limits of its exclusive authority; and each might, under circumstances, justly be deemed an auxiliary administration.' It would be wearisome and useless to attempt the task of extracting from all the reported cases; even those in our own books present an array of burdensome authority. The student will find the law upon this subject fully discussed and learnedly illustrated in Brodie v. Bickley, 2 Rawle, 431; Miller's Estate, 3 id. 312; Willing v. Perot, 5 id. 264; Short's Estate, 4 Harris, 66; Com. v. Smith, 5 Barr, 142, Thompson, C. J. The cases of Mothland v. Wireman, 8 Penn. 188, and Dent's Appeal, 10 Harris, 514, abundantly show that assets are not to be transmitted to the administrator or executor of the domicile when there are domestic claimants or claimants within the jurisdiction of the ancillary administration. It would be a waste of time to discuss what we see so ably discussed in the opinion of Lewis, C. J., in the last-mentioned case. There are a number of legatees under the will of Isaac Brown Parker in this commonwealth, and it being admitted that there are no debts to be paid in New Jersey, there is no reason whatever for sending the Pennsylvania assets there for distribution, especially as the same persons are accountants in both states. The rule against transmission when there are domestic claimants, creditors or legatees is too firmly settled upon authority, and is not to be departed from or doubted. The auditor and court were entirely right in maintaining as they did this principle. Implied trusts to executors result from the intention of their testators, to be gathered from the terms and provisions in wills, and have always been more or less common. Several English cases have been cited, and among them Brush v. Allen, 5 Mod. 68, and South v. Allen, id. 101, in which trusts to executors are implied from provisions very similar to the case in hand; and it is not improbable that we might feel ourselves impelled to imply such a trust in this and cases like it, were it not that the legatees for life are placed on the footing of trustees for those in remainder, in regard to the thing, or the principal of the fund devised for life, by the forty-fourth section of the act of 24th of February, 1834. That act requires legatees to give security in the orphans' court, having jurisdiction of the account of the executors, to protect the interest of those in remainder, before the executors shall deliver the property or pay over the money to the legatees for life, and which security, like that of trustees by appointment, is liable to the supervision of the orphans' court at all times. The existence of the law is a reason for

trator to administer the English assets. The growing practice in the United States, where the decedent has left property in different states, is to permit the domiciliary administrator to receive ancillary administration letters in each state where there are effects.[1]

Simple contract debts are assets in the hands of the domiciliary administrator at the place where he is domiciled, although the debtor resides in another state, and the note or contract out of which the debt arose may have been made in a foreign state. A payment, in good faith, of such note may be made to either administrator; and where there are two administrators, the domiciliary and an ancillary, though the latter resides in another state than that where deceased was domiciled, a debtor residing in a state where no administration has been taken out may pay to either.[2]

The rule of domiciliary administration is based on citizenship, and a presumption arises that every citizen leaves assets; and administration may be granted on the strength of such citizenship. But in a foreign state the rule is different, and it must there be shown that the decedent left property in the state subject to administration; and it has been held, and such is the better rule, that where the deceased lost his life by reason of the negligence of a person or corporation, that the right of action is sufficient property to support the issuing of ancillary administration in the state where the injury occurred; and while a different rule has been established in some states, it has rested on the theory that a right of action existed in favor of the next of kin or the domiciliary administrator.[3]

inferring that no trust in the executors was contemplated by the testator in this case. But these considerations, while they persuade us, we will not say they rule our decision, for it rests also upon our own precedents. Our courts follow the rule, whenever it is applicable, that the bequest of the use of a thing, or the product or interest of a fund, is as a rule to be regarded as a bequest of the thing itself."

[1] See *ante*, n. 3, p. 349, and nn. 1, 2, p. 350.

[2] See above and § 131 and notes.

[3] Holding the right of action exists, see Hartford & N. H. R. R. Co. v. Andrews, 36 Conn. 213; Marcy v. Marcy, 32 Conn. 308; Morris v. C., R. I. & Pac. R. R. Co. 65 Iowa, 729; Re Miller, 5 Dem. (N. Y.) 381; Dennick v. R. R. Co. 103 U. S. 11; Leonard v. C. S. N. Co. 84 N. Y. 48. *Contra*, McCarthy v. C., R. I. & P. R. R. Co. 18 Kan. 46; Taylor v. Penn. Co. 78 Ky. 348; Limekiller v. H. & St. Joe R. R. Co. 33 Kan. 84; 19 Am. & Eng. R. R. Cas. 184. See *ante*, n. 2, p. 350.

It has, however, been held, and for good reasons, that where the deceased was a resident of a foreign state, but died in a state out of his domicile, and held life insurance in a state other than that in which he died, a public administrator could not bring an action on the policy in the state where the death occurred.[1] Where the local law permits assignments of choses

[1] Ins. Co. v. Lewis, 97 U. S. 682: "This action was commenced in the circuit court of St. Louis county, Missouri, by Lewis, the defendant in error, as public administrator of that county, upon a policy of insurance dated July 30, 1873, whereby the Union Mutual Life Insurance Company of Maine agreed to insure the life of William S. Berton, 'of Milwaukee, county of Milwaukee, state of Wisconsin,' in the sum of $5,000, payable three months after due proof of death, to his executors, administrators or assigns. The case was removed for trial into the circuit court of the United States for the eastern district of Missouri, where a verdict and judgment were rendered against the company. A new trial and motion in arrest of judgment having both been denied, the present writ of error is prosecuted by the company. A preliminary question is presented as to the right of defendant in error, as public administrator of St. Louis county, Missouri, to maintain any action whatever upon the policy sued on. His authority in the premises is claimed to exist under a Missouri statute of 1868, which was in force when this action was instituted. That statute makes it the 'duty of the public administrator to take into his charge and custody the estates of all deceased persons in his county, in the following instances: First, when a stranger dies intestate in the county, without relatives, or dies leaving a will, and the executor named is absent, or fails to qualify; second, when persons die intestate without any known heirs; third, when persons unknown die or are found dead in the county; fourth, when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same; fifth, when any estate of any person who dies intestate therein or elsewhere is left in the county liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow or heir in this state; sixth, when from any good cause said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost.' . . . On 17th September, 1875, the defendant in error, as public administrator, filed in the clerk's office of the probate court of St. Louis county a notice, addressed to the judge of that court, informing creditors and all other persons interested in the estate of William S. Berton, 'late of the county of St. Louis,' that he had, on that day, taken charge of such estate for the purpose of administering the same; and immediately thereafter, on the same day, commenced this action in the circuit court of that county, without making and presenting proofs of loss, or giving the company previous notice of this administration, or that he, as such administrator, asserted any claim under the policy. These steps were taken, as was conceded on the trial below, 'for the sole purpose of administering upon and collecting the

in action, or rights of action that survive the death, an action will lie on an assignment of a right of action, even where the right of action could not be sued on by the assignee in the

policy in suit.' It also appears that Berton at the date of the policy, and at his death, which occurred on 31st March, 1874, was a resident of Milwaukee and a citizen of Wisconsin; that he died in that city, and had not at any time resided in the state of Missouri; that he left no money, property, papers or other estate in Missouri; that the policy sued on was found among his papers after his death; that on the 5th June, 1874, administration upon his estate was granted by the county court of Milwaukee county, Wisconsin, to Benjamin K. Miller; that the defendant in error was never ordered by the probate court of St. Louis county or any other court to take charge of Berton's estate. The bare statement of these facts, which are admitted or are clearly proven, is enough to show an absolute want of authority in Lewis to take charge of or administer the estate of Berton. His collection by suit of the amount, if any, due from the company upon the policy sued on, or any administration by him, in his capacity as public administrator of Berton's estate, would be acts of palpable usurpation. The notice filed by him in the clerk's office of the probate court was ineffective for any purpose, although it contained the false recital that Berton was 'late of the county of St. Louis.' Such a notice was required only when he took charge of an estate upon which he could legally administer. No judgment rendered in this action, upon the merits, could protect the company against a future suit by the proper representatives of Berton's estate. This would not be the case if Lewis' claim to administer that estate had any sound foundation upon which to rest. It was not the purpose of the statute to authorize a suit by a public administrator in Missouri against a foreign corporation doing business there, upon a contract, not made or to be executed in that state, with a citizen of another state who neither resided nor died nor left any estate in Missouri. . . . It is claimed, however, that this view cannot be sustained without questioning the authority of the public administrator in a collateral proceeding. In support of that position we are referred to Wetzell v. Waters, 18 Mo. 396; Riley's Adm'r v. McCord's Adm'r, 24 id. 265; Lancaster, Adm'r, v. Washington Life Ins. Co. of New York, 62 id. 121, and Johnson v. Beazley, 65 id. 250. We have not access at this time to the volume of reports last cited, but upon examining the other cases we find nothing which in any degree militates against the views we have expressed. . . . But it is further contended that the answer, which relied upon these objections to the action, was in the nature of a plea in abatement, and that such objections were, according to established rules of practice in the federal courts, waived when the company answered to the merits without first having the court dispose of the issue as to Lewis' right to maintain the action. This position is, however, wholly untenable. The defense, so far as it impeached the authority of Lewis, by virtue of his appointment as public administrator, to collect the amount, if any, due on the policy, was in bar, not in abatement, of the action. The defense, if true, did not question his capacity as such admin-

state where the injury occurred.[1] This rests on the rule that the right of action, being vested by assignment in the assignee, relates to the remedy.

§ 133a. Ancillary and domiciliary administration.— The ancillary administrator cannot be called to account for assets received by him in that capacity, except in the state of his appointment as such administrator. His appointment as ancillary administrator is a separate office; the tribunal from which he received it and which gave him jurisdiction is the only one to which he is amenable, and to that only to the extent of its own jurisdiction — the state it represents.[2] If an administrator goes into a foreign state from that of his appointment and collects debts there, and is sued in such state by local creditors, he makes himself liable as executor *de son tort*, and may be compelled by bill of discovery to disclose the amount of the assets he has received in that jurisdiction.[3] It has also been held that where funds are sent by the domiciliary administrator to an agent in a foreign country or state to pay legatees and distributees, such agent may be compelled to pay over to the *cestuis que trust*, without the appointment of an ancillary administrator.[4]

The law of the place governs the ancillary administrator, and must prevail; but several other matters and questions of interest often arise. If the funds in the hands of such administrator are sufficient to pay the debts in the jurisdiction where he is appointed, his course is plain. He pays the debts under the direction of the court as though no funds elsewhere existed, settles his account with the court, and, when such account is passed upon and confirmed, transmits the remainder

istrator to perform any of the duties imposed upon him by law. It only insisted that he, as such lawfully appointed administrator, had no cause of action against the company upon the alleged contract of insurance."

[1] Harper v. Butler, 2 Pet. 239; Talmage v. Chapel, 16 Mass. 71; Vimont v. C. & N. W. R. R. Co. 69 Iowa, 296.

[2] Brownlee v. Lockwood, 20 N. J. Eq. 243; Fay v. Haven, 3 Met. 109; Vaughan v. Northup, 15 Pet. 1; Caldwell v. Harding, 5 Blatch. C. C. 501; Morrill v. Morrill, 1 Allen, 131; Chase v. Chase, 2 Allen, 101; Bond v. Graham, 1 Hare, 482; Preston v. Melville, 8 Cl. & Fin. 12; In re Webb, 18 N. Y. Sup. Ct. 124; Sayre v. Helme, 61 Pa. St. 299; Boston v. Boylston, 2 Mass. 384.

[3] Taylor v. Benham, 5 How. (U. S.) 233; Campbell v. Tousey, 7 Cow. 64; Clopton v. Booker, 27 Ark. 482.

[4] Arthur v. Hughes, 4 Beav. 506.

and turns the balance of the estate, if any, over to the administrator of the domicile of the deceased for distribution among the heirs.[1] If there are claimants within the jurisdiction of the ancillary administrator, he cannot transmit the funds, but must distribute them there, for the court will protect claimants in its own jurisdiction in the enjoyment of their property, and will lend its aid to the recovery of their debts.

When the estate is insolvent a more difficult question arises. The better opinion is that the court of the territory or *situs* is supreme, and that the assets must be distributed in proportion to the creditors' claims filed therein. Hence, if a citizen of Massachusetts, having property in New York, dies, and ancillary administration is sued out in New York and domiciliary administration is obtained in Massachusetts, the assets in the latter state go to pay those debts proved in that state that are presumed to have been contracted in reliance on the assets there, and the state will not surrender such assets until its claimants and citizens are paid. But this priority is not given to the citizens of Massachusetts alone, but to all creditors who prove their claims within that jurisdiction. The same rule applies to the ancillary administration in New York. But as the rule is that a creditor may prove his claim in either

[1] Preston v. Melville, 8 Cl. & F. 1. Meiklan v. Campbell, 24 Beav. 100: "But in such cases, in view of the delicacy of the issues and complications of the trust, it is important that the ancillary administrator should make no payments except under the decree of the court by which he is appointed." Wharton on Conflict of Laws, sec. 619; Vaughan v. Northup, 15 Pet. 1; Miller's Estate, 3 Rawle, 312; Jennison v. Hapgood, 10 Pick. 481; Mackey v. Coxe, 18 How. (U. S.) 100; Parker's Appeal, 61 Pa. St. 478; Dawes v. Head, 3 Pick. 128, where Chief Justice Parker, in the opinion rendered in case last cited, after stating the general principle that the ancillary administrator should collect the debts in the particular jurisdiction, and forward the assets to the domiciliary administrator, declares that the exception to the general rule grows out of the duty of every government and its courts to protect its own citizens in the enjoyment of their property and recovery of their debts, so far as this may be done without violating the rights of creditors living in a foreign country. "In relation to the effects found within our jurisdiction and collected by aid of our laws, a regard to the rights and interests of our citizens requires that those effects should be made answerable for the debts due to them, in a just proportion to the whole estate of the deceased, and all the claims upon it, whatever they may be." Wharton on Conflict of Laws, sec. 620.

jurisdiction, and, having proved in one and received a distributive share, he may credit the sum so received and prove the balance of his debt in the other jurisdiction, if he is entitled to more under its laws; the law of the *situs* governs in each state.[1] He will only be entitled to receive, with what he has received, a *pro rata* sum equal to that paid the creditors in the state where he last proves his claim. He is always required to account for what he has received, but may receive a sum sufficient to place him on an equality with the other creditors.[2]

[1] See Wharton on Conflict of Laws, secs. 622, 623, 624; Loomis v. Farnum, 14 N. H. 119; Tyler v. Thompson, 44 Texas, 497; Rosenthal v. Renick, 44 Ill. 202; Despard v. Churchill, 53 N. Y. 192; Fretwell v. McLemore, 52 Ala. 124; Cook v. Gregson, 2 Drew. 286; Barry's Appeal, 88 Pa. St. 131.

[2] See above note. In re Estate of Gable, 79 Ia. 179: "Briefly stated, but with sufficient fullness, the facts in the case demanding consideration are these: John S. Gable, always a resident of Pennsylvania, died in that state August 11, 1881. He owned property in Pennsylvania and lands of great value in Iowa, some of them situate in Tama county. He was at the time of his death largely indebted, and, as it now appears, was insolvent, the assets of his estate being sufficient to pay but an inconsiderable portion of his indebtedness. . . . The executors named in the will were discharged, and on the 27th day of December, 1881, others were appointed by the proper court in Pennsylvania. At their request an administrator was appointed by the proper court of Tama county, who soon after resigned, and on the 8th day of April, 1882, R. E. Austin was appointed administrator by the same court, and proceeded in the discharge of his duties as such. It is shown that administration was taken out in this state in compliance with the request and direction of the Pennsylvania administrators, and was intended to be ancillary. Claims of a large amount were filed against the estate in Pennsylvania, and were paid so far as the assets were sufficient; but the large portion of the claims after the assets were exhausted remained unpaid. Claims were filed against the estate in Iowa, and, upon the petition of the administrator, lands of great value were sold, and the proceeds applied to the payment of the claims filed and proved here. A large balance remained in the hands of the Iowa administrator, which the petitioners in this case pray may be distributed to the heirs and devisees of the decedent. The Pennsylvania administrators intervene in this action, claiming that the principal administration in the case was in Pennsylvania, and the Iowa administration was merely ancillary. They pray that the money assets in the hands of the Iowa administrator may be transmitted to them, to be used in the payment of the debts of the estate which have been or may be duly proved. . . . It is shown that the Iowa administrator has in his hands more than $19,000 after paying claims allowed by the Iowa court, $7,000 being received for rents and the balance from sales of lands. There seems to be no doubt that the

While we have said that a creditor may pay a debt to a foreign administrator, where no administration has been taken out in his own state, the rule would be different if it had been taken out, for then he should pay to the ancillary administra-

Pennsylvania claims against the estate constituted the ground upon which the order for the sale of the lands was made. The petition for the sale is based upon that ground, among others, and there can be assigned no other reason why the court ordered Iowa lands to be sold, realizing $19,000 in excess of the Iowa claims. Unless such was the purpose the order was improvident and erroneous, in that it required a sale of lands so largely in excess of the demands against the estate. . . . The testator was a resident of Pennsylvania and died in that state. He owned and held personal property there and was seized of land situated therein. Administration was first taken in Pennsylvania, and creditors residing there, in accord with the laws of that state, established their claims against the estate. Administration was afterwards taken out in Iowa, at the request of the Pennsylvania administrator, to the end that the lands owned by the testator in Iowa should be appropriated to the payment of the debts of the estate. Under these facts no doubts can be entertained that the Pennsylvania administrator is the principal and the Iowa the ancillary administrator. Chamberlin v. Wilson, 45 Iowa, 149; Story on Confl. of Laws, sec. 58; Whart. Confl. sec. 627; 3 Williams, Ex'rs (6th Am. ed.), 1762; Stevens v. Gaylord, 11 Mass. 256; Fay v. Haven, 3 Metc. 109; Williams v. Williams, 5 Md. 467; Clark v. Clement, 33 N. H. 563; Green v. Rugely, 23 Tex. 539; Spraddling v. Pipkin, 15 Mo. 118; Childress v. Bennett, 10 Ala. 751; Perkins v. Stone, 18 Conn. 270. We are not required to consider the functions and duties of the principal and ancillary administrations further than to inquire as to the disposition to be made of assets in the hands of the latter, after all debts of the estate established therein have been paid. It may here be remarked that the duties of the ancillary administration are not prescribed by statute, and that the common law prescribes those duties in obedience to the obligations of comity existing between independent states. . . . What is an ancillary administration? It is subservient and subordinate to the principal administration. The subserviency and subordination is to attain the ends of justice, which is the object and aim of all acts of a court of justice. The terms relate to the objects and ends attained by the administration, not to the methods and practice pursued by the courts having jurisdiction of the administration. Under the law upon the subject which prevails over the whole Union, all the property of a decedent, including his lands, except a homestead and other exemptions, is subject to the payment of his debts and is assets for that purpose. Debts must be paid before the assets can be distributed to the heirs, legatees and devisees, without regard to the place of residence of the creditors. Justice requires that creditors should be paid when they have duly established their claims. Such claims may be established either in the principal or ancillary administration. They will be paid when established in the ancillary administration, if assets sufficient are found within its jurisdic-

tor, but he might not then be safe. Something depends on the character of the debt and the evidence of it.[1] If it be a promissory note, the domiciliary administrator may assign or transfer it; so even a chose in action. But in such case the

tion. If sufficient assets for the payment of debts are not found under the control of the principal administration, and there is under the control of the ancillary administration money assets in excess of the debts proved therein, justice would forbid that such administration should disregard the demands of right and distribute the assets to the heirs; but, as it has not before it the claims of all the creditors, some having been established in the principal administration proceedings, justice demands that the ancillary administration, in response to the demands of comity, transmit the money assets to the principal administrator. Story on Confl. of Laws, secs. 513, 518; Whart. Confl. Laws, secs. 619, 620; 3 Williams, Ex'rs, 1763, 1767, and notes; 1 Williams, Ex'rs, 424; Goodall v. Marshall, 11 N. H. 88; Low v. Bartlett, 8 Allen, 259; Fay v. Haven, 3 Metc. 109; Davis v. Estey, 8 Pick. 475. As we have before said, lands now in all the states of the Union, except such as may be exempted by law, are assets for the payment of the debts of a decedent. They are sold, and the money proceeds are applied to the payment of the decedent's debts. It is vain to discuss the question of whether the avails of land so sold are to be treated as personalty or real estate. The land is converted into money. The land then ceases to be assets of the estate; the money becomes assets. There is no mystery in changing lands into money. One owning a farm knows he owns and is possessed of so many acres of land. He sells it and receives therefor $10,000 in cash. He then knows he owns no lands, but in the place of his farm he has $10,000 in cash. He would probably be amused should any one claim that this money was realty or should be regarded and treated by the law as realty. The law provides for the change of the lands, of estates, into money. When the money is received, it is personal property. It doubtless is true that cases arise where, in order to enforce liens or equities, money proceeds of lands are appropriated as the land would have been appropriated had there been no sale of it. It appears that there ought to be no doubt, obscurity or mystery as to the character of the money and the appropriation of it to be made. It is avails of land set apart by the law for the payment of debts of the estate. The land was converted into money, as shown by the petition filed in the ancillary administration, asking for sale of the Iowa lands, for the purpose of paying debts proved in both the principal and ancillary administrations. If there had been no debts all the land would not have been sold except to pay the Pennsylvania creditors. It is now found that after the ancillary administrator has paid all debts established therein a surplus remains. To carry out the purpose of the law and the objects for which the land was sold the balance in the hands of the ancillary administrator must be transmitted to the principal administrator in Pennsylvania."

[1] Shaw v. Staughton, 3 Keble, 163; Huthwaite v. Phaire, 1 Man. & Gr. 159; Whyte v. Rose, 3 Q. B. 493. See § 133, n. 1; *ante*, n. 2, p. 350.

ancillary administrator should receive the debt. The authorities are conflicting and dependent on the circumstances of the cases.[1]

[1] Equitable Life Assurance Society v. Vogel's Executrix, 52 Am. Rep. 844; S. C. 76 Ala. 446 (Clopton, J.): "The estate of a decedent, wherever he may reside at the time of his death, and in how many different states portions of the property and assets may be situate, is one estate. Notwithstanding this unity of estate, if administrations are granted in the different states where the property is located, there is not unity of administration — they are separate and independent of each other. The ancillary administration is not the agent of the administration of the domicile, although the latter is the primary administration in the sense that so far as the rights of distributees are concerned, the distribution of the personal estate is governed by the law of the domicile. Each administrator is accountable in the courts of the state of his appointment, and each administration must be settled where it is granted. . . . And although, as a general rule, it is said personal property follows the person of the owner, simple-contract debts for the purpose of granting administration are regarded as having a *situs* in the state where the debtor resides. The ancillary administrator alone has authority to collect the debts and receive the assets situate in the state where the administration is granted. He collects and receives them in his capacity of administrator generally. If it be conceded that, in the absence of prohibitory statutory provisions, a voluntary payment of a debt to the domiciliary representative, by a debtor residing in a different jurisdiction, there being no domestic administrator appointed, will be a good discharge, it is clear that if a domestic administrator is appointed, the foreign administrator has no authority to collect the debt, and a voluntary payment to him would be no bar to a subsequent suit brought by the domestic administrator to recover the same debt. Notwithstanding such is the relation between the primary and auxiliary administrations, and such the authority of the ancillary and the disability of the principal administrator, the title to all the personal property of the decedent is vested in the domiciliary representative for the ultimate purposes of administration — collecting and receiving the assets, paying the creditors, and making distribution according to the law of the domicile, or to the provisions of the will, if there be one — and for the purpose of distribution, the locality of the personal property, wherever situate, is regarded as at the domicile. Wilkins v. Ellett, 9 Wall. 740. Accordingly when the auxiliary administrator has fully paid the domestic creditors, the residue will ordinarily be transmitted to the administration of the domicile for final distribution. The difficulty does not lie in any defect of the title to the possession, but in a limitation or qualification of the general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect the interests of its home creditors. The disability of the original administrator extends only to the remedy, as whoever sues must conform to the law of the forum. Dixon v. Ramsay, 3 Cr. 319; Gayle v. Blackburn, 1 Stew. 429; Hutchins v. State Bank, 12 Met. 425. On this principle, the principal

§ 134. General remarks — Goods in transitu. — It has been held that assets can only be transferred or assigned by

administrator having obtained the possession of notes or other written evidences of debt, the transfer of which authorizes the assignee to sue in his own name, may sell and transfer them, and the transferee may maintain suit in his own name against the debtors in the state of their domicile. Wilkins v. Ellett, 108 U. S. 256. On the same principle, if a debtor residing in a foreign country comes within the jurisdiction of the appointment of the original administrator, so that he can be found for service of process, such debtor is suable there; and a plea that he is liable to pay only to the administrator appointed at the place of his domicile will not avail to defeat the action. Story, Confl. Laws, § 515, n. 1, 8; Wms. Ex'rs, 1663, note n; Merrill v. New England L. Ins. Co. 103 Mass. 245; S. C. 4 Am. Rep. 548. The original administrator may enforce by suit the payment of a debt due from a debtor in another state, the evidence of which is in his possession, when he can do so without being compelled to resort to the courts of the domicile of the debtor. The applicability of this principle to corporations remains to be considered. A corporation has its domicile, as to debts due by it, in the state where it is chartered, for the reason that 'there only can it be sued or found for the service of process.' This general rule has an exception; and a corporation, like a natural person, is suable wherever it can be found for the service of process as provided by law. When therefore a corporation has voluntarily subjected itself to suit in another state, and appointed an agent there upon whom process may be legally served as a condition of doing business, it has a domicile in such state for the purposes of suit, and can be found there for the service of process. New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138. In Huss v. Central R. R. & Banking Co. 66 Ala. 472, it was held that a foreign corporation, having a known place of business in this state, and an authorized agent upon whom process can be served, may plead the statute of limitations in like manner as a domestic corporation or resident citizen; and that such foreign corporation is not absent from the state, in the meaning of the exception to the statute. Brickell, C. J.: 'There was continuous presence here, though the domicile of the corporation was in Georgia — continuous liability to suit, and all parties having claims against them were unembarrassed because their domicile was elsewhere.' . . . The administrator appointed in New York has never had possession of the policy, and has not commenced any suit against the defendant in that state. Upon the authorities cited, as well as on principle, we hold that on the facts stated in the replication, the defendant had a domicile in this state, in the meaning that the debt on the policy is an asset at its domicile; and that the defendant is suable in the courts of this state, as process could be and was served in the manner provided by the law. Such asset is subject to administration in this state. The plaintiff having been qualified as executrix by a court having jurisdiction where the decedent had his domicile at the time of issuing the policy and at the time of his death, and having the title and possession coming to her, has the right to collect the debt if she is not compelled to re-

the administrator of the state or jurisdiction where the property is situated. This is correct as to property, but it is not

sort to a suit in New York. For this purpose she is authorized to bring and maintain this action. The city court having jurisdiction of the subject-matter and the parties, the judgment she has obtained is entitled to the same faith and credit in New York as in Alabama notwithstanding an administrator had been appointed in New York. No such injustice can ensue as a double satisfaction, unless by the laches of the defendant. Judgment in this suit and its payment will operate to bar any subsequent action that may be brought by the New York administrator. Wallace v. McConnell, 13 Pet. 136; Whipple v. Robbins, 97 Mass. 107; Whart. Confl. of Laws, § 626. 'The priority of suit will determine the right.'" Bull v. Fuller, 78 Iowa, 20. See § 133, note 1. Moore v. Jordan, 59 Am. Rep. 550; S. C. 36 Kan. 271: "Among other defenses they allege that at the time of his decease Horace Moore was a resident of, and had his home and domicile in, the state of Illinois, and was only temporarily sojourning in Colorado at the time of his death; that the notes and mortgage which came into the possession of the plaintiff are not, and never have been, assets in her hands; that according to law she has no interest in nor title to the notes and mortgage, nor to the proceeds thereof; no power to collect or receive anything on account of them, or to release or acknowledge satisfaction thereof, and no right or authority to bring or maintain an action thereon in this state against the defendants. . . . In an action brought by a foreign administrator in Wisconsin, upon a bond secured by mortgage on real estate situate there, the defendants set up as a defense that the plaintiff had no right to maintain the action, but that an administrator had been appointed under the laws of Wisconsin, which appointment vested in the latter all rights of action upon the bond. The supreme court of the United States held that the defense was good, saying: 'The bond in suit was *bona notabilia* in Wisconsin, and a plea that the subject of the action constituting such *bona notabilia* was, on the death of the decedent, in another jurisdiction than the one which appointed the administrator suing as plaintiff, has always been a good answer to the action. It is an averment of facts which in law excludes all right to or control over the property in that state by the foreign administrator.' Noonan v. Bradley, 9 Wall. 405; Ins. Co. v. Lewis, 97 U. S. 682. The mere fact that the notes and mortgage chanced to be in Colorado does not give plaintiff title to them, nor make them assets in her hands. Prior to the death of the intestate the notes had no fixed *situs*, but followed the domicile of the owner, wherever that might be. After his death they lost their transitory character and became local. The principal administration, to which all others are subordinate, is at the domicile of the intestate, and the universally recognized rule of law is that the succession to and distribution of personal estate is governed by the law of the place where the intestate was domiciled at the time of his death. 'The original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased, for the purpose of collecting the effects of the estate, paying the debts,

applicable, it seems, to a claim or indebtedness in the nature of a chose in action, a note, bond or account; for surely if the

and making distribution of the residue according to the law of the place or directions of the will, as the case may be.' Wilkins v. Ellett, 9 Wall. 740; Story, Confl. Laws, sec. 379. . . . So the rule has become established that debts such as are evidenced by promissory notes are *bona notabilia* at the domicile of the debtor. The supreme court of the United States epitomized the law on this question where it is said: 'The general rule of law is well settled that, for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor, and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable.' Wyman v. Halstead, 109 U. S. 654; Chapman v. Fish, 6 Hill, 554; Att'y-General v. Bouwens, 4 M. & W. 171, 191; Owen v. Miller, 10 Ohio St. 136; Thompson v. Wilson, 2 N. H. 291; McCarty v. Hall, 13 Mo. 480; Willard v. Hammond, 1 Fost. 382; Shakespeare v. Fidelity Ins. Co. 97 Pa. St. 173; Dial v. Gary, 14 S. C. 573; S. C. 37 Am. Rep. 737; Life Ins. Co. v. Woodworth, 111 U. S. 138; 1 Williams, Executors, 426. The courts, however, are not entirely uniform in their holding upon this question. Some of the authorities hold that the title to these evidences of debt is not only in the domiciliary administrator, but that they are assets in his hands instead of at the domicile of the debtor. Eells v. Holder, 2 McCrary, 622; Speed v. Kelly, 59 Miss. 47. The only conflict, however, is in regard to whether they are assets at the domicile of the intestate or at the domicile of the debtor. No authority to which our attention has been called holds that the mere fact that the evidences of debt happen to fall into the hands of an ancillary administrator, appointed at a place other than the domicile of the intestate or of the debtor, vests the title to the debt in him. The case mainly relied on by the plaintiff is St. John v. Hodges, 9 Baxt. 334. In that case the court uses some language tending to sustain the plaintiff's theory that the administrator in the jurisdiction where negotiable notes are left at the time of the death of the decedent has title to them, although the debtor resides elsewhere. It appears, however, that the notes were left at the domicile of the intestate, and they came into the possession of the administrator appointed in that jurisdiction, and the case therefore only sustains the title of the administrator at the domicile. In a later case the same court, referring to the decision in St. John v. Hodges, say that the question decided was that 'notes are *bona notabilia* at the domicile of the intestate when left there at the time of his death, and that administration taken out in another state where the debtor resides does not draw thereto the title or the right to the notes, unless they actually came to the hands of such administrator.' Goodlett v. Anderson, 7 Lea, 289. . . By the authority of Wyman v. Halstead, *supra*, it is settled that neither the place of payment of simple contract debts like promissory notes, nor the place where they happen to be found, is

debt was payable at the home of the decedent when living, his administrator can assign the evidence of it.[1] When goods

important or controlling. It has been decided that payment to an administrator appointed in the state in which the intestate had his domicile at the time of his death is good against any administrator appointed elsewhere. Wilkins v. Ellett, 9 Wall. 740; Wyman v. Halstead, *supra*. And it has been held in this state that, in the absence of any opposing administration, the courts in this state, *ex comitate*, will recognize the title and possession of personal property in this state in an administrator appointed in the domicile of the decedent, and that payment to such an administrator of the debt due to the decedent will be good. Denny v. Faulkner, 22 Kan. 96." Mackey v. Coxe, 18 How. (U. S.) 104; Stevens v. Gaylord, 11 Mass. 256; Hooker v. Olmstead, 6 Pick. 481; Trecothick v. Austin, 4 Mason, 16; Doolittle v. Lewis, 7 Johns. Ch. 49; Brown v. Brown, 1 Barb. Ch. 189: Vroom v. Van Horne, 10 Paige, 549; Parsons v. Lyman, 20 N. Y. 103; Klein v. French, 57 Miss. 662.

[1] Marshall County v. Hanna, 57 Iowa, 372; Hough v. Bailey, 32 Conn. 288; Makepeace v. Moore, 10 Ill. 474. Campbell v. Brown, 64 Iowa, 425: "It is insisted that a foreign executor cannot maintain an action in the courts of this state. For the purposes of this case this will be conceded; and, this being done, it is further insisted that, for the same reason, the assignee of such an executor cannot maintain such an action. Counsel cite and rely on Thompson v. Wilson, 2 N. H. 291; Stearns v. Burnham, 5 Me. 261, and Dial v. Gary, 14 S. C. 573. . . . There are authorities which announce a different rule, and it has been held that a foreign executor may assign a promissory note, and that his assignee may maintain an action thereon in the courts of a state other than that in which the executor was appointed. Harper v. Butler, 2 Pet. 239; Wilkins v. Ellett, 108 U. S. 256; Rand v. Hubbard, 4 Metc. 252; Petersen v. Chemical Bank, 32 N. Y. 21; Owen v. Moody, 29 Miss. 79; Story's Conflict of Laws, sec. 359. The reasoning upon which these cases are based mainly is that the title to promissory notes belonging to an estate vests in the executor, and that he can do what the decedent could have done in his life-time; that is, assign the notes so as to vest title in his assignee, so as to enable him as such owner to maintain an action thereon against the maker in the courts of any state in which the latter resides. This seems to us to be the better view, and we therefore adopt it, deeming it unnecessary to state at greater length the reasoning upon which the cited cases are based." In Petersen v. Chemical Bank, 32 N. Y. 21, Denio, C. J., said: "It is not, therefore, because the executor or administrator has no right to the assets of the deceased existing in another conntry that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and others resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability, however inconsistent with principle, is very firmly established. . . . But the principle of law which I think governs this case is that the succession to the personal estate of

are *in transitu* they are charged to the administrator who first reduces them to possession.[1] The probate court has no jurisdiction over an ancillary administrator beyond the amount of assets he has received in the state where he is appointed.[2]

Where there is a conflict between the law of the domicile and the law of the *situs*, as to the priority of payment in case of insolvency, the law of the *situs* should prevail.[3] Each state is sovereign in its own limits in respect to the rules of international law, and such rules govern and apply to the reciprocal relations of administration issued in the several states; and

a deceased person is governed by the law of the country of his domicile at the time of his death. . . It is not so held because the foreign legislature or the local institutions have any extraterritorial force, but from the comity of nations. Accordingly it is a necessary supplement to the doctrine that if the law-making power of the state where the property happens to be situated or the debtor of the deceased resides, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of the domicile, they must take their rights subject to such restrictions. One of the most natural as well as the most usual of these qualifications is that which is intended to secure the creditors of the deceased residing in the country where the assets exist. It is in part to subserve this policy that the personal representatives are not permitted to prosecute the debtor or parties who withhold his effects in our courts. But the protection to the creditor is further secured by the remedy which is provided by allowing him to take out administration in the jurisdiction where the assets are. . . . There is not, I think, any reason why the plaintiff should be precluded from maintaining his action on account of his making title through a foreign administration. The rule is not that our courts do not recognize titles thus acquired; it is simply that a foreign executor or administrator can have no standing in our courts. The plaintiff does not occupy that position. He sues in his own right and for his own interests, and represents no one. In my opinion the disability to sue does not attach to the subject of the action, but is confined to the person of the plaintiff. If he is an unexceptionable suitor, and there is no rule of form or policy which repels him from our courts, he is to be received, and he may make out his title to the subject claimed in any manner allowed by law, and it has been shown that title acquired through a foreign administration is universally respected by the comity of nations."

[1] Orcutt v. Orms, 3 Paige, 459; Story on Conflict of Laws, sec. 520; Wells v. Miller, 45 Ill. 382; Collins v. Bankhead, 1 Strobh. 25.

[2] Lynes v. Coley, 1 Redfield (N. Y.), 405. See *ante*, § 133.

[3] Holmes v. Remsen, 20 Johns. 265; Miller's Estate, 3 Rawle, 312; Milne v. Moreton, 6 Bin. 353; Union Bank v. Smith, 4 Cr. C. C. 509; Harrison v. Sterry, 5 Cranch, 289; McElmoyle v. Cohen, 13 Pet. 312; Dawes v. Head, 3 Pick. 128.

each state may be regarded as a foreign sovereignty as between other states of the Union. The domiciliary administrator who, during his administration, collects or receives assets belonging to the estate that were in a foreign country at the time of the death of the principal is accountable for them in the court of his appointment, if he has not taken out letters of administration in the state or country where he obtained the assets.[1]

Where it is not necessary for the ancillary administrator, pursuant to the general rule, in order to pay debts due creditors at the domicile of the decedent, to transmit the balance of the estate left in his hands after satisfying the claims of creditors in his jurisdiction to the domiciliary administrator for final distribution, the court which granted the ancillary administration may direct that such balance be distributed to the heirs or legatees within its jurisdiction.[2] The ancillary administrator must satisfy in full the creditors filing and proving claims in his jurisdiction, although the estate is insolvent at the place of principal administration.[3] The rate of interest allowed to distributees is dependent on the law of the state pursuant to which the administration is made.[4]

§ 135. Of the notice of proof of wills.— Under the English law there were two methods of proving wills — the common form and the solemn form; the first under the statute 1 Vic. ch. 26, sec. 9. Any will having a perfect attestation clause and the requisite number of witnesses may be admitted to probate on the affidavit of the executor alone, that he believes

[1] Cureton v. Mills, 13 S. C. 409; S. C. 36 Am. Rep. 700, a long and exhaustive case; Rosenthal v. Renick, 44 Ill. 202; Wharton on Conflict of Laws, sec. 636, n. 3; Hill v. Tucker, 13 How. (U. S.) 458; McLean v. Meek, 18 How. (U. S.) 16; Goodall v. Marshall, 11 N. H. 88; Porter v. Heydock, 6 Vt. 374; Bullock v. Rogers, 16 Vt. 294; Abbott v. Coburn, 28 Vt. 663; Dawes v. Boylston, 9 Mass. 337; Fay v. Haven, 3 Metc. 109; Brownlee v. Lockwood, 20 N. J. Eq. 243; Mothland v. Wireman, 3 Penn. 185; Sayre v. Helme, 61 Pa. St. 299; 2 Kent's Com. pp. 434, 435.

[2] Meiklan v. Campbell, 24 Beav. 100; Innes v. Mitchell, 4 Drew. 141; 1 De G. & J. 423. See Dawes v. Head, 3 Pick. 145; Mackey v. Coxe, 18 How. (U. S.) 100; Carmichael v. Ray, 5 Ired. Eq. 365.

[3] Cook v. Gregson, 2 Drew. 286; Pardo v. Bingham, L. R. 6 Eq. 485; S. C. L. R. 4 Ch. App. 735. See note 3, p. 334.

[4] Raymond v. Brodbelt, 5 Ves. 199*a*; Bourke v. Ricketts, 10 Ves. 330; Young v. Godbe, 15 Wall. 562; Fitch v. Remer, 1 Biss. 337; Arnold v. Potter, 22 Iowa, 194; Duncan v. Helm, 22 La. Ann. 418; Findlay v. Hall, 12 O. St. 610; Sands v. Smith, 1 Neb. 108.

it to be the last will and testament of the deceased. If the attestation clause is defective, the affidavit of one of the witnesses is required. If the affidavit proves the execution in fact regular, probate may be allowed; if not, the deceased is declared to have died intestate and administration is granted. If, however, any person who is interested therein desires to contest the will, under the common form, he may do so within the time fixed by statute. Under the solemn form, formal notice is given of the time and place of presenting the will; and all jurisdictional prerequisites must be observed.[1] This latter form is adopted by most of the American states, although the common form is practiced in some of them.

Where notice has been given to all parties interested, if no contest is made, no more than one subscribing witness need attend; for, until objections are made, that one is sufficient; if there is a contest the court will continue the case until another term on a showing made, as no one could know whether there will be a contest or not.[2] The notice is usually

[1] Brown v. Anderson, 13 Ga. 171.

[2] Redfield on Wills, 29, note. The nature of the proceeding in the probate of the will in solemn form is well defined in Brown v. Anderson, 13 Ga. 171, as requiring that all parties in interest be duly cited to witness the proceedings, that the will be produced in open court, that the witnesses be there examined, and that all parties in interest have the privilege of cross-examination. Such probate, it is said, is conclusive. But we apprehend that probate in common form — that is, where no one appears to contest the probate — is equally conclusive, the American practice commonly requiring, in all cases, general notice by publication of the time and place of probate, whether in common or in solemn form; the only practical difference in the two made in the practice of many states being that the former is allowed where no objection is interposed, and the latter is always required where any contestant appears. But in some of the states the same distinction prevails between probate in common form and solemn form as in the English practice, the former being wholly *ex parte*, and not conclusive upon any one interested in the estate and who shall demand probate in solemn form within the time allowed by statute. Armstrong v. Baker, 9 Ired. 109; Kinard v. Riddlehoover, 3 Rich. 258; Etheridge v. Corprew, 3 Jones' Law, 14; Carroll v. Llewellin, 1 Har. & McHen. 162; Redfield on Wills, Pt. 2, 80. Where proof in solemn form is intended, formal notice is given to all parties interested. And where the will is proved in the first instance in common form, any one interested in the estate may, within reasonable time, cite the executor to make proof of the will in solemn form, or *per testes*. Jackson v. Le Grange, 19 John. 386: "I consider it well settled that on a trial at law where the execution of a will comes in question, the party supporting or claiming under it is not under the

by publication; those most likely to be interested generally know of the death of the testator or decedent, and this form of notice published in the neighborhood of the deceased is sufficient.[1] This notice of the probate of the will is a jurisdictional one, and without it the proceedings will be opened on application of any one interested, or the probate deemed invalid.[2]

Lost wills were originally established in a court of chancery; but in many states jurisdiction is conferred on the probate court for that purpose. As to the manner of establishing, a work on chancery practice is more appropriate.[3]

Originally, the ecclesiastical courts had jurisdiction of the proof of wills which related only to personalty; but they had none where real estate was devised, and wills which affected realty had to be proved in the common-law courts or established in equity.[4] Where the probate court refuses to proceed in the establishment of a will, or to prove the same, the superior courts will compel action by *mandamus*.[5]

§ 136. The proving of the will — Law of domicile, how far governs.— When the probate court has jurisdiction over the subject-matter, and has acquired it over the parties by giving the prescribed notice, its order establishing a will is conclusive. Equity will not set aside such order because fraud, undue influence or mistake is alleged in the making of the will. The former court is presumed to have passed upon all these questions. The law of the testator's domicile governs the will as to its form and the solemnities cast around it, and also the capacity of the testator to make it, both as to his mental powers and his competency to dispose of the property.[6] So far as the disposition of personalty is con-

necessity of calling more than one of the subscribing witnesses, if he can prove the execution. . . . But if the witness cannot prove these requisites, the other witness ought to be called." Gary's Probate Law, secs. 196–198.

[1] See above note.

[2] Noyes v. Barber, 4 N. H. 406; Sawyer v. Dozier, 5 Ired. 97; Patton v. Allison, 7 Humph. 320; Gary's Probate Law, 196.

[3] Hall v. Allen, 31 Wis. 691; Shumway v. Holbrook, 1 Pick. 114; Dublin v. Chadbourn, 16 Mass. 433; Parker v. Parker, 11 Cush. 519; 2 Story's Eq. 1445, 1449; Morrison v. Arnold, 19 Ves. 670.

[4] See above note.

[5] Marriot v. Marriot, 1 Strange, 666; Rex v. Raines, 1 Ld. Ray. 361; Redfield on Wills, Pt. 2, 45.

[6] Potter v. Brown, 5 East, 130; Sill v. Worswick, 1 H. Black. 690; Stan-

cerned, the probate of the will is conclusive.[1] The jurisdiction of a court of equity may be invoked for the purpose of construing the will, where that power is not conferred on the probate court, as is done only in rare instances, and then, as a rule, equity has concurrent jurisdiction, as has any court before which the proceedings arise, unless a construction has already been given in the state of decedent's domicile by a competent court.[2] The law of real property is governed by the *rei sitæ* or place where situated, and in cases relating thereto the local law controls as to the inheritance, mode of conveyance, interpretation and succession by inheritance, as well as to the formalities of execution.[3] The rule in the American states is that the probate of the will in the state of the domicile of the deceased is conclusive everywhere when done in solemn form.[4] It does not matter where the personal property is situated, for a will probated at the domicile of the deceased carries with it the personal property, wherever situated, since it follows the person of the owner.[5]

ley v. Bernes, 3 Hagg. Ecc. 373; Dixon v. Ramsay, 3 Cranch, 319; Armstrong v. Lear, 12 Wheat. 169; Harrison v. Nixon, 9 Pet. 483; Gillman v. Gillman, 52 Me. 165; Dunlap v. Rogers, 47 N. H. 281; Moultrie v. Hunt, 23 N. Y. 394; Swearingen v. Morris, 14 O. St. 424; Johnson v. Copeland, 35 Ala. 521; Hill v. Townsend, 24 Tex. 575; Jones v. Gerock, 6 Jones' Eq. 190.

[1] See *ante*, § 000; Manuel v. Manuel, 13 O. St. 458.

[2] Harrison v. Nixon, *supra;* Adams v. Norris, 23 How. (U. S.) 353; Parsons v. Lyman, 20 N. Y. 103; Freeman's Appeal, 68 Pa. St. 157. But see Norris v. Harris, 15 Cal. 226, holding a will must be interpreted according to the place in which it is made, if the property is there situated.

[3] Holman v. Hopkins, 27 Tex. 38; Curtis v. Hutton, 14 Ves. 537; United States v. Crosby, 7 Cranch, 115; Applegate v. Smith, 31 Mo. 166; Armstrong v. Lear, 12 Wheat. 169; Lucas v. Tucker, 17 Ind. 41. Wharton, Confl. Laws, sec. 587: "In England and the United States, as to realty, the *lex rei sitæ* prevails, as to all that concerns the will, including the solemnities by which it is to be attested. Thus a will, though not valid by the law of the testator's last domicile to pass his personalty, may yet, if executed in conformity with the laws of the state where the testator's real estate is situate, be valid to pass such real estate, and may be admitted to probate in such latter state."

[4] See note 2, p. 378.

[5] See note 3. Wharton, Confl. Laws, sec. 592: "The last domicile of the testator is to be resorted to as giving the law by which the interpretation of a will, so far as concerns personalty, is to be determined. In a leading case before the supreme court of the United States it was ruled that in a bequest of personalty to the testator's 'heir at law' the question as to

It is clearly settled in regard to personal estate that the law of the domicile of the owner governs in the distribution of it, and also as to the requisites and validity of the instrument disposing of it.[1] But in regard to the mode of administration, the law of the place where such estate is situated controls.[2]

If the last will of the deceased is made abroad, where he is domiciled, its mode of execution, so far as it may affect the personal estate, is governed by the law of such domicile.[3] This is the rule where it is made in a state other than that of the testator's domicile. The will must comply with the law of the domicile.[4] This is true, notwithstanding it is executed according to the law of the place where the goods are situated and found; if it is not executed according to the law of the place of domicile, no title to personalty will pass by it.[5] Sometimes, however, the statute of a state provides that a will made in accordance with the law of the place where executed is valid in that state, and where such statute exists, the will made abroad is good, although it does not conform to the law of the place of domicile.[6] And where a citizen of a state executes a will valid where executed, and afterwards removes to a state under the laws of which it is invalid, and becomes domiciled there, then, his property being at the place of the last domicile, he is held to have died intestate.[7]

So a will must be construed according to the law of the place of the domicile of the testator; as where one who is

who came under this designation was to be determined by the law of the testator's last domicile. If he were domiciled in England it would be the eldest son. If in Pennsylvania, and states of a similar jurisprudence, it would be all the children. Nor does it matter that the testator was a native of another land, nor even that after the will was made in one domicile he moved to another, where he died. In either case it is the last domicile that prevails. And in conformity with this rule legacies are payable in the currency and according to the modes of the testator's last domicile. The law of the last domicile is the rule, subject to exceptions to be stated, because in respect to personalty it is the law of last domicile that is supreme."

[1] Nat v. Coons, 10 Mo. 543; Anstruther v. Chalmer, 2 Sim. 1.

[2] Adams v. Norris, 23 How. 353.

[3] See notes 3 and 5, p. 379.

[4] See notes 3 and 5, p. 379.

[5] See note 3, p. 379.

[6] Harrison v. Nixon, 9 Peters, 483.

[7] See note 2, p. 378; Abston v. Abston, 15 La. Ann. 187; Perin v. McMicken, id. 154.

domiciled in England makes a will giving his personal property to his heirs at law, the words "heirs at law" must be construed to mean "heirs at law" as known and defined in England.[1]

The law of the place also governs as to what should be regarded as testamentary capacity to make the will.[2] Hence,

[1] Adams v. Norris, 23 How. 353.

[2] Pipon v. Pipon, Amb. 25. Ennis v. Smith, 14 How. (U. S.) 424: "For several hundred years upon the continent, and in England, from reported cases, for a hundred years, the rule has been that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the *jus gentium*. Lord Thurlow speaks of it as such in the house of lords, in the case of Bruce v. Bruce. Erskine, in his Institutes of the Law of Scotland (B. 3, tit. 9, sec. 4, 644), says this rule is founded on the law of nations. He says: 'When a Scotsman dies abroad *sine animo remanendi*, the legal succession of his movable estate in Scotland must descend to his next of kin according to the law of Scotland; and where a foreigner dies in this country *sine animo remanendi*, the movables which he brought with him hither ought to be regulated, not by the law of the country in which they locally were, but that of the proprietors *patria* or domicile whence he came, and whither he intends again to return. This rule is founded in the law of nations, and the reason of it is the same in both cases, that since all succession *ab intestato* is grounded upon the presumed will of the deceased, his estate ought to descend to him whom the law of his own country calls to the succession as the person whom it presumes to be most favored by the deceased.' The law of Scotland had been different in this particular, but it was brought into harmony with the law of the rest of Europe by the decision of the house of lords, in Bruce v. Bruce, 6 Brown's Par. Cases, 550, 566; 2 Bos. & Pul. 226, 230, 231; Lord Stair's Institutes, B. 3, tit. 8, sec. 5; Hog v. Lashley, 6 Brown, P. C. 577, House of Lords, June 25, 1788; Robertson on Personal Succession, 131; Omman v. Bingham, House of Lords, March 18, 1776; Colville and Landler v. Brown and Brown, Dist. Successes, App. pp. 1, 4, W. & S. 28. The earliest case reported in the English books is that of Pipon v. Pipon, Amb. 6, 27. Lord Hardwicke recognized in it the rule that the personal estate, in cases of intestacy, followed the person, and becomes distributable according to the law or custom of the place where the intestate lived. Among other reasons given by him is that a contrary rule would be extremely mischievous, and would affect our commerce. No foreigner could deal in our funds but at the peril of his effects going according to our laws, and not those of his own country. He reaffirmed the same a few years afterwards in Thorne v. Watkins, 2 Ves. Sr. 35. Lord Kenyon did the same when he was master of the rolls, in 1787, in Killpatrick v. Killpatrick, which will be found cited in Robertson on Personal Succession, 116. In 1790 the house of lords acted upon the rule in Bruce v. Bruce and two years afterwards in Hog v. Lashley. Many

it is held that where a will was made by a married woman in a country where she had power to make a will and dispose of her personal property, such will is good in a country where she could not exercise that right.[1] And finally the property passes under a will according to the law in force when the testator dies, and not that in effect when the will was made.[2] There is a conflict of authorities on this subject, however.[3] So it has been held that the law of the domicile of the testator governs in relation to the determination of what constitutes a will and is binding in other countries; and the use of technical language in a will is interpreted by the law of the country where the testator resided at the time of his death.[4]

§ 137. Administrators and appointment of.— An administrator, in the usual sense of the word, is a person appointed by a competent court to take charge of and execute such orders as may be made by it concerning the estate of a deceased person. In some cases he is appointed to discharge the duties devolved by the will of the testator upon the executor named therein, as when the latter becomes incompetent to perform them. At common law there were several classes of administrators.

cases followed in the English courts, and the only question since has been, what was the domicile of the intestate at the time of his death? In the United States the rule has been fully recognized. 14 Martin (La.), 99; 3 Paige, 182; 2 Gill & Johns. 193, 224, 228." Re Maraver, 1 Hagg. 498.

[1] Despard v. Churchill, 53 N. Y. 192; Holman v. Hopkins, 27 Tex. 38.

[2] Redfield on Wills, 408; De Peyster v. Clendining, 8 Paige, 295; Bishop v. Bishop, 4 Hill, 138.

[3] See Redfield on Wills, 406, pt. 2.

[4] Jarman on Wills, *337, note: "So the validity of the execution of a will is to be determined by the law in force at the testator's death. Jones v. Robinson, 17 Ohio St. 171; Mullen v. McKelvy, 5 Watts, 399; Houston v. Houston, 3 McCord, 491; In re Elcock, 4 McCord, 39. But it is held in Pennsylvania that the laws governing property when a will is executed are to govern, and not those prevailing (if different) at the testator's death. Taylor v. Mitchell, 57 Penn. St. 209; Gable v. Daub, 40 Penn. St. 217. The question whether an estate is to be divided according to the law as it existed at the death of the testator or at the death of the devisee for life will depend upon the further question whether the estate of the devisee in remainder is vested or contingent. If his estate vested at the death of the testator, no subsequent change of the law could affect his rights. If it remained contingent until the death of the devisee for life, the law as it then stood must govern, unless a different intention appear in the will. Van Tilburgh v. Hollinshead, 14 N. J. Eq. 32."

Where the executor nominated in the will of the deceased dies or has departed the realm, or failed to qualify, an administrator is appointed by the court, with the will annexed, whose duties and liabilities are precisely the same as those of an executor. An administrator *de bonis non* is one appointed to administer on that portion of an estate not already administered. Appointment of an administrator may be made during the minority of the executor nominated in a will, or next of kin not of full age. So where a will is contested and there is controversy over it, an administrator *pendente lite*, sometimes known as a special administrator, may be appointed. He has no authority other than to take care of and preserve the estate during the pendency of the litigation. Where one is appointed a general administrator by the court before the probate of a will, and the instrument is subsequently found, he will be treated as a special administrator appointed *pendente lite*.[1]

Under the English practice, an administrator *durante absente* might be appointed during the absence of a party entitled to administration. Other limited administrators were appointed by the ecclesiastical courts, but the consideration of these can be of little use under the American practice.

The title of the executor or administrator to the goods, moneys, chattels and effects of the deceased is a limited one, and is difficult to define. But as the executor or administrator has a right to sell and dispose of the assets or convert them to his own use, thus making himself chargeable with their value, and subjecting them to the same incidents as if they were his own, it is important to consider the question in two aspects. His title is, however, so limited that he cannot rightfully sell or convert the goods to his own use. Ordinarily he holds them or the assets, until actual sale or conversion, *en autre droit*, and not in his own right. The assets are not treated as his own unless converted by him; they will not go to his executors or admin-

[1] When a person dies testate, naming an executor in the will, the court has not jurisdiction to appoint a general administrator to precede the executor in the settlement of the estate; and where one is appointed under such circumstances, the petition asking for such appointment of a special administrator, he will be presumed to be one, although the terms used purport to confer general powers. Such special administrator cannot allow claims, or give notice for filing them, and any notice given by him is supererogatory. Pickering v. Weiting, 47 Iowa, 242.

istrators and are not liable to execution for his debts.[1] The administrator has no control over real estate except to subject it to the payment of the debts of the deceased. Where there is more than one administrator or executor, either may sell, pledge, mortgage or dispose of the property to a *bona fide* purchaser, who will acquire a good title.[2] Executors cannot become purchasers at their sales.[3]

[1] Redfield on Wills, Part II, 117. Whale v. Booth, 4 T. R. 625, note, per Lord Mansfield, C. J.: "The general rule, both of law and equity, is clear that an executor may dispose of the assets of the testator; that over them he has absolute power, and that they canot be followed by the testator's creditors. It would be monstrous if it were otherwise, for then no one would deal with an executor. He must sell in order to effect the will; but who would buy, if liable to be called to an account? It is also clear that if, at the time of alienation, the purchaser knows they are assets, this is no evidence of fraud; for all the testator's debts may have been already satisfied; or if he knows that the debts are not all satisfied, must he look to the application of the money? No one would buy on such terms. There is one exception indeed, where a contrivance appears between the purchaser and executor to make a *devastavit*." Drinkwater v. Drinkwater, 4 Mass. 354.

[2] Clarke v. Tufts, 5 Pick. 337; Redfield on Wills, Part II, 212.

[3] Litchfield v. Cudworth, 15 Pick. 23; Smith v. Everett, 27 Beav. 454; Scott v. Tyler, 2 Dick. 725. And see Beecher v. Buckingham, 18 Conn. 110; S. C. 44 Am. Dec. 583; Sneesby v. Thorne, 7 De Gex, M. & G. 402; Fellows v. Mitchell, 2 Vern. 515; Murrell v. Cox, 2 Vern. 570; Doe dem. Stace v. Wheeler, 15 Mees. & W. 623. Same rule applies to joint administrators: Beecher v. Buckingham, *supra;* Cole v. Miles, 10 Hare, 182; Willis v. Farley, 24 Cal. 500; Bonney v. Ridgard, 1 Cox, Ch. 147; Yerger v. Jones, 16 How. 30; Andrew v. Wrigley, 4 Bro. Ch. 125; Keane v. Robarts, 4 Madd. 357; McLeod v. Drummond, 17 Ves. 154; Field v. Schieffelin, 7 Johns. Ch. 152; Crane v. Drake, 2 Vern. 616; Ewer v. Corbet, 2 P. Wms. 149; Hill v. Simpson, 7 Ves. 166; Petrie v. Clark, 11 Serg. & R. 388; Haynes v. Forshaw, 11 Hare, 97. And see Sanders v. Richards, 2 Collyer, 568. As to mortgages to secure prior advances, see Miles v. Durnford, 13 Eng. L. & Eq. 123; S. C. 2 Sim. (N. S.) 237; 2 De Gex, M. & G. 641; Petrie v. Clark, *supra*. See, generally, Vane v. Rigden, L. R. 5 Ch. Cas. 667; Carter v. National Bank of Lewiston, 71 Me. 449; Smith v. Ayer, 101 U. S. 327; Goodwin v. Am. National Bank, 48 Conn. 564. As to certificates of stock, see Wood's Appeal, 92 Pa. St. 392. Compare with Shaw v. Spencer, 100 Mass. 388; Beecher v. Buckingham, *supra;* Nugent v. Gifford, 1 Atk. 463; McLeod v. Drummond, *supra*. And see, generally, Shaw v. Spencer, *supra;* Green v. Sargeant, 23 Vt. 466. The rule is so well settled that citations are unnecessary. Harrington v. Brown, 5 Pick. 521; Mercer v. Newsom, 23 Ga. 153; Moses v. Moses, 50 Ga. 30; Ives v. Ashley, 97 Mass. 204; Gilbert's Appeal, 78 Pa. St. 269; Staples v. Staples, 24 Gratt. 231; Sheldon v. Rice, 30 Mich. 297. And see Scott v. Umbarger, 41 Cal. 415;

§ 138. Sales of personal property.—It cannot be denied that the title of the administrator to personal property is a limited one and that he takes it in trust. His right to sell, pledge or mortgage it is an incident arising from possession in favor of the innocent purchaser. If the person purchasing knows that the property is held in trust by the administrator, and that it is being diverted from the purposes contemplated by law, he buys it at his peril.[1] If there is collusion or express or implied

Mead v. Byington, 10 Vt. 122; Ex parte Bennett, 10 Ves. 393; Davoue v. Fanning, 2 Johns. Ch. 255; Booraem v. Wells, 19 N. J. Eq. 90. See as to heirs, devisees, etc., Lytle v. Beveridge, 58 N. Y. 592; Clark v. Blackington, 110 Mass. 372; Ives v. Ashley, *supra;* Mercer v. Newsom, *supra;* Harrington v. Brown, *supra;* Litchfield v. Cudworth, 15 Pick. 521; Jackson v. Van Dalfsen, 5 Johns. 47. Creditor of heir not entitled to impeach sale. Lothrop v. Wightman, 41 Pa. St. 303.

[1] Scott v. Tyler, 2 Dick. 725; Watkins v. Cheek, 2 Sim. & St. 205; McLeod v. Drummond, 17 Ves. 154; Hill v. Simpson, 7 Ves. 166; Keane v. Robarts, 4 Madd. 357; Crane v. Drake, 2 Vern. 616. Smith v. Ayer, 101 U. S. 326: "There is no doubt that, unless restrained by statute, an executor can dispose of the personal assets of his testator by sale or pledge for all purposes connected with the discharge of his duties under the will. And even where the sale or pledge is made for other purposes, of which the purchaser or pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained; for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes than those of the estate, or the intended perversion of the proceeds. The executor, though holding the title to the personal assets, is not absolute owner of them. They are not liable for his debts, nor can he dispose of them by will. He holds them in trust to pay the debts of the deceased, and then to discharge his legacies; and, as in all other cases of trust, he is personally responsible for any breach of duty. And property thus held, acquired from him by third parties with knowledge of his trust and his disregard of its obligations, can be followed and recovered. The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril. The adjudications in support of this doctrine are very numerous. The doctrine pervades the whole law of trusts. In Colt v. Lasnier, reported in 9 Cow. 320, Chief Justice Savage, of the supreme court of New York, reviewing the cases, concludes that the correct rule both in England and in that state is, 'That any person receiving from an executor the assets of his testator, knowing that this disposition of them is a violation of his duty, is to be adjudged as conniving with the executor, and that such person is responsible for the property thus received, either as purchaser or pledgee.' And so in many cases it

fraud, the purchaser acquires no title; he must look to the authority of the trustee, who only acts in fact as the agent of the court in the lawful disposition of the trust fund.[1]

If the administrator purchases at his sale, it does not render the sale void, but voidable at the instance of the heir; but the creditor of the heir or a stranger cannot interfere and ask that it be set aside.[2] The fact that the administrator or executor wastes the money is not sufficient to set aside the sale unless the purchaser participated in the *devastavit;*[3] this is the rule unless there was very gross negligence, amounting to implied fraud.[4] Often the administrator applies to the court

has been held that the payment by the executor of his own private debt with the assets of the testator is a *devastavit;* that is, a wasting of the estate. There are, indeed, some exceptions to this, as where the executor has paid debts of the testator with his own money to the value of the assets used. But, beyond a few exceptions of this kind, such a use of assets is considered entirely indefensible, and the party receiving them will not be permitted to retain them, on the ground that the transaction itself gives him notice of their misapplication, and thus necessarily involves him as a participator in the fraud. And the doctrine is supported by many authorities that where a party has reasonable grounds for believing that an executor intends to misapply them, or is in the very transaction converting them to private uses, such party can take no advantage from the transaction. In the case of Miller v. Williamson, the court of appeals of Maryland held that the fact that the executor made an assignment of such assets to secure a debt owing to parties by a mercantile firm of which he was a member, was sufficient, in contemplation of law, to notify them that he was about to commit a *devastavit.* 5 Md. 219. And where an administrator has assigned promissory notes of the estate in his hands for goods for his own use, the supreme court of Indiana held that it was a waste of the assets; and that if the assignee had knowledge, even from the nature of the transaction, that the administrator was thus acting in violation of his trust, the right of property in the notes was not divested, and he could not hold the notes or profit by such assignment as against those rightfully entitled to them. Thomasson, Adm'r, v. Brown, 43 Ind. 208. See, also, Field v. Schieffelin, 7 Johns. (N. Y.) Ch. 150, and Petrie v. Clark, 11 Serg. & R. 377."

[1] Williamson v. Morton, 2 Md. Ch. 95; Wilson v. Doster, 7 Ired. Eq. 233; pawn for antecedent debt: Petrie v. Clark, 11 Serg. & R. 388; and see McLeod v. Drummond, *supra;* Sacia v. Berthoud, 17 Barb. 18; Carter v. Nat. Bank of Lewiston, 71 Me. 453; Scott v. Searles, 7 S. & M. 504; Smartt v. Watterhouse, 6 Humph. 159; Swink v. Snodgrass, 17 Ala. 656. See § 137, note 4.

[2] Wilson v. Moore, 1 Mylne & K. 348, and note 1, p. 385.

[3] Lothrop v. Wightman, 41 Pa. St. 303; Litchfield v. Cudworth, 15 Pick. 30.

[4] Hill v. Simpson, 7 Ves. 166; Shaw v. Spencer, 100 Mass. 388; Ins. Co. v. Austin, 42 Pa. St. 263.

for power to sell personalty for his protection, where he is unable to sell at the price it is appraised at in the inventory, as he is ordinarily chargeable in his account with its appraised or inventoried value.[1] In case a stock of liquors comes into his possession he may sell them without license under the excise law, the same as a sheriff who sells on execution.[2]

§ 139. The payment of debts and how they are established.— After administration has been established, or the executor appointed, by the law of most of the American states he is required to give notice, usually by publication, informing creditors of his appointment and requesting them to present any claims they may have to the probate court for allowance or to establish them by proper proof. The administrator in this respect represents the estate, and admits or rejects the claim filed by the creditor as advised. If he refuses to allow it, the claimant must proceed to establish the claim before the probate court or some court having power to hear and determine its validity. The law usually requires the claimant to support the claim by his oath or affirmation.

Certain claims are preferred by statute in a large number of states, embracing the eastern states and many others. The rule of preference and order of payment is as follows: 1st, expenses of last sickness, funeral and probate fees; 2d, taxes; 3d, debts due to the state; 4th, debts due to the United States; 5th, other general creditors, and sometimes requiring these preferred claims to be filed within a short time or preference will be lost; 6th, legacies; 7th, in some states docketed judgments have priority.[3] The funeral expenses and expenses of last sickness are generally required to be paid without reference to the statute.[4] The law of congress is paramount

[1] Williams v. Ely, 13 Wis. 1; Munteith v. Rahn, 14 Wis. 210. Whenever the personal property must be converted into money to pay debts and settle the estate, the executor or other administrator, if he cannot sell for the appraised value (as in case of stock and tools on a farm, or a stock of merchandise, which must generally be sold by auction or in gross), or finds it necessary to make a public auction sale, should apply for an order authorizing the sale, for his own protection, as he is chargeable in his account with the appraised value.

[2] Williams v. Troop, 17 Wis. 463.

[3] Ainslee v. Radcliff, 7 Paige, 439.

[4] The amount allowed for funeral expenses by the English courts was fixed at £20 for insolvent estates, and considered reasonable. Hancock v. Podmore, 1 Barn. & Ad. 260. Much larger sums have been allowed, depending upon circumstances. Amer-

within the jurisdiction and gives preference to claims due the United States. The administrator must pay the preferred debts filed and established, or he will become personally liable if he pays creditors of an inferior grade, provided the claims are made known to him by proper notice.[1] This rule applies to ancillary administrators as well as to domiciliary ones.[2]

ican courts usually allow a reasonable sum, including enough for a head-stone. Wood v. Vandenburg, 6 Paige, 277; Fairman's Appeal, 3 Conn. 205; Porter's Estate, 77 Pa. St. 43; Ferrin v. Myrick, 41 N. Y. 315; Bennet v. Ives, 30 Conn. 329; Patterson v. Patterson, 59 N. Y. 574.

[1] U. S. R. S. secs. 3466, 3467: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." United States v. Fisher, 2 Cr. 358; United States v. Hooe, 3 Cr. 73; Harrison v. Sterry, 5 Cr. 289; Prince v. Bartlett, 8 Cr. 431; United States v. Bryan, 9 Cr. 374; Thelusson v. Smith, 2 Wh. 396; United States v. Howland, 4 Wh. 108; Conard v. Ins. Co. 1 Pet. 386; Hunter v. United States, 5 Pet. 173; United States v. State Bank, 6 Pet. 29; United States v. Hack, 8 Pet. 271; Brent v. Bank of Washington, 10 Pet. 596; Beaston v. Farmers' Bank, 12 Pet. 102. "Every executor, administrator or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid." Field v. United States, 9 Pet. 182; Brent v. Bank of Washington, *supra*. Notes on Revised Statutes, sec. 3466: "'The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes; and, as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms.' Story, J., in United States v. State Bank, 6 Pet. 29, 34. 'The administrator of a creditor of the government, duly appointed in the state where he was domiciled at his death, has full authority to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it, whether it be at the seat of government or at any other place where the public funds are deposited.' Vaughn v. Northup, 15 Pet. 1."

[2] Wilson v. Lady Dunsany, 18

In the American states no distinction is made in regard to priority between specialties and simple debts.[1]

Liabilities for torts, where actions therefor survive, are regarded as simple debts and stand on the same footing as contracts. There are sometimes contingent claims that cannot be filed or even proved during the life of the administration, nor until after the contingency happens.[2] In such cases the heir may become liable to the extent of the property he has received from the estate.[3] The administrator has the right to compromise doubtful claims against the estate.[4] Where one executor compromises a claim in good faith, such compromise has been held binding on his co-executors, although they dissented.[5]

But we cannot go into the intricate details concerning all the duties of the administrator in regard to claims. We have not even discussed his power to sue or be sued; such matters do not involve the jurisdiction of the courts; and we only desire to point out the power of the court over him.

§ 140. Sale of real property by administrator.— As we have before noticed, under the law of descent real property vests in the heir immediately on the death of the ancestor;

Beav. 293; Holcomb v. Phelps, 16 Conn. 127.

[1] Redfield on Wills, pt. 2, p. 237, sec. 38.

[2] Collins v. Crouch, 13 Q. B. 542; Bacon v. Thorpe, 27 Conn. 251.

[3] Dain v. Vansands, 45 Conn. 600; McGonigal v. Colter, 32 Wis. 614. 3 Leading Cases in Real Property, 460: "The heir is not personally liable, but only in respect to his land taken by descent, and he is not liable beyond the assets received by him (Bryan v. Blythe, 4 Blackf. 249; Barnetts v. Hayden, 5 J. J. Mar. 108; Bedell's Heirs v. Lewis' Heirs, 4 id. 562; Bishop v. Hamilton, id. 548; Coyle v. Reynolds, 7 S. & R. 328; Coulter v. Selby, 39 Pa. St. 360; Ellis v. Gosney's Heirs, 7 J. J. Mar. 109; Green v. Rugely, 23 Tex. 539; Holder's Heirs v. Mount's Heirs, 2 J. J. Mar. 187; Ransdell v. Threlkeld's Adm'rs, 4 Bush, 347; Tremble v. Jones' Heirs, 3 Murph. 579; Payson v. Hadduck, 8 Biss. 293; Whitaker v. Young, 2 Cow. 569; Williams v. Ewing, 31 Ark. 229); he does not become personally liable even on a decree *pro confesso* (Carneal's Heirs v. Day, 2 Lit. 397); and, except where the question of assets has been put in issue, a decree or judgment should be of assets descended (Leather's Representatives v. Meglasson, 2 T. B. M. 63; Roman v. Caldwell's Heirs, 2 Dana, 20; Cogwell's Heirs v. Lyon, 3 J. J. Mar. 39); but to avail himself of the defense of no assets, the heir must plead nothing by descent. Van Deusen v. Brower, 6 Cow. 50."

[4] Redfield on Wills, pt. 2, 242; Smith v. Everett, 27 Beav. 446.

[5] See above.

but this vesting, in most of the American states, is subject to an inchoate lien of the creditor of the decedent, when the personal property proves insufficient to pay the claims allowed against the estate by the probate court.[1] Upon a showing that the personal property is insufficient to pay the debts of the decedent the court may order a sale of the real estate, and such sale is ordinarily made on notice to the heirs and an opportunity given them to resist; and it, or rather application for it, is subject to such conditions and notice as the statutes of the state provide. The right to possession of the land remains in the heir until a showing is made which requires that it be sold, and an interlocutory order therefor is made and the sale approved by the court.[2] The grantee of the heir will stand in no better position than his grantor.[3] The former

[1] 3 Leading Cases in Law of Real Property, 457, 458.

[2] 3 Leading Cases in Law of Real Property, 458: "The heir has, immediately on the demise of the ancestor, a vested and conveyable interest (Hyde v. Barney, 17 Vt. 280), and must be made a party to all actions or suits *in rem* affecting the subject of descent, as a bill to foreclose a mortgage. Huggins v. Hall, 10 Ala. 283. He takes the land subject to the dower right of the widow of the ancestor (Farmer v. Ray, 42 Ala. 125); but his right to possession is (except perhaps in Georgia, as to which see Albritton v. Bird's Ex'r, R. M. Charlt. 93) immediate. Willis v. Watson, 5 Ill. 64; Piatt v. St. Clair's Heirs, 6 Ohio, 227; S. C. Wr. (Ohio) 261; Blair v. Cisneros, 10 Tex. 87; Chubb v. Johnson, 11 Tex. 469. Charging the land with the testator's debts will not deprive him of his right. Trent v. Trent's Ex'r, Gilmer, 174. The land is taken, it is true, subject to the testator's debts; but until the liability is enforced in the manner and under the circumstances prescribed by law, his right of possession cannot be interfered with, and he will be entitled to all rents and profits accruing between the casting of the descent and the assertion of the lien of debts. Cockrell v. Coleman's Adm'r, 55 Ala. 583; Patton v. Crow, 26 id. 432. The supreme court of Illinois thus states the position of descended lands with reference to the ancestor's debts: 'It is not accurate to say that the lands are charged, but rather that they are liable to be charged, as the law has declared that the lands may be subjected to the payment of such debts, and has prescribed the manner and time within which it may be done.'" Bishop v. O'Conner, 69 Ill. 431.

[3] 3 Leading Cases in Law of Real Property, 459: "As a consequence of the universal subjection of lands in this country to debts, the heir cannot alien land descended to the prejudice of the ancestor's creditors. Watkins v. Holman, 16 Pet. 25; Elliott v. Moore, 5 Blackf. 270; Taylor v. Taylor, 8 B. Mon. 419. If the heir sell the land he is answerable for the amount received (Hamilton v. Heirs of Haynes, Cam. & Nor. 413); and where the ancestor's debts are a lien upon the land, which is the case in

takes the latter's title subject to the statutory right of sale, by order of the court, for the payment of the debts of the deceased, if the personal property is insufficient for that purpose. In some states it is not necessary to make the heir a party to the proceedings for such sale.[1] It thus appears that the title that descends to the heir is burdened with the statutory lien for the payment of creditors of the decedent that is as certain as the claim for dower, and, although inchoate, is fixed by law. But when it appears that the administrator received sufficient personal property to pay the debts and costs of ad-

most, if not all, of the states, the grantee of the heir will not stand in any better position than the heir (Austin v. Bailey, 87 Vt. 219), and may be called to answer the debt, or to contribute if an heir other than his grantor has paid the testator's debt. Graff v. Smith, 1 Dall. 481. But it is held in Tennessee that if the sale by the heir has been in good faith the alienee has a good title and the creditor must seek his remedy against the heir personally. Smith v. Heirs of Thomas, 14 Lea, 324; and see Covell v. Weston, 20 Johns. 414. As the land is liable for debts only in default of personal assets of an intestate, it follows that before the heir can be called upon in respect to his land, or the land itself attached, unless it is subject to a special lien, there must be shown an exhaustion of the personal assets. Reynolds v. May, 4 G. Greene, 283; Blossom v. Hatfield, 24 Hun, 275; Woodfin v. Anderson, 2 Tenn. Ch. 331; Nix v. French, 10 Heisk. 377. In some states it is held that this exhaustion must appear by an administration of the personal assets. Chandler v. Chandler, 78 Ind. 417; Rinard v. West, 92 id. 359; M'Loud v. Roberts, 4 H. & M. 443; Hall v. Bumstead, 20 Pick. 2. It is not necessary, however, to prove the exhaustion of assets beyond a reasonable certainty; therefore, when a return of no assets has been made in an action against an administrator, it is not necessary to file a bill of discovery against him before proceeding against the land."

[1] 3 Leading Cases in Law of Real Property, 459: "In Georgia land may be charged without making the heir a party to the proceedings. Telfair v. Stead's Ex'rs, 2 Cr. 407. But in Mississippi it has been held that the heir must be a party to a petition by an administrator to sell lands for the intestate's debts. Hargrove v. Baskin, 50 Miss. 194. In Pennsylvania it is said (Walker's Appeal, 1 Grant, 431) that an administrator is not bound to exhaust the personal estate before applying for an order to sell real estate; but, as the order cannot be made without the exhibition to the court of a full inventory and appraisement, this would seem to make little difference, as the court would apply the rule of priority as to liability; the administrator is not bound to settle his account before making application (Huckle v. Phillips, 2 S. & R. 4; Weaver's Appeal, 19 Pa. St. 416; Wall's Appeal, 31 id. 62); but where the application comes from a creditor it is prematurely made and cannot be granted until after a settlement of the administrator's account. Freno's Estate, 1 W. N. C. 270."

ministration, and that he has been guilty of a *devastavit* causing a deficiency of assets, the land cannot be taken.[1] This rule rests on the words of the statute, usually to the effect that the land shall only be sold when the personal estate proves insufficient to pay the claims filed and approved. The heir is not, in this country, liable for the ancestor's debts unless he has sold the land that belonged to the estate, nor then unless the claim was filed and proved in the probate court.[2] But if the debt has not accrued until after the time for presenting claims has elapsed, like the liability of a surety on a bond, the rule would be different.[3]

§ 141. Jurisdiction of the probate court to sell lands.— The title of real estate descends to the heirs of the decedent immediately upon the latter's death, subject, however, to the lien or conditional power of the probate court to order the realty sold for the payment of the debts of the decedent, on the condition that the personal property proves insufficient to discharge them. The fee is vested, therefore, in the heir, whether he takes by will or the law of descent, subject to this equitable lien; and when claims are filed and proved against the estate the administrator represents the estate, as we have shown in the last section, and the heirs have no control over his actions or the allowance of the claims; that rests with the administrator and the court. There is but one matter that the heir can contest, on the application of the administrator to sell real estate for the payment of claims against the estate, and that is whether sufficient assets came into the hands of the administrator to satisfy all claims from the personal estate. Or, in other words, whether the administrator has been guilty of fraud or *devastavit*.[4]

Looking at the matter from a legal stand-point, the title or *rem* is vested in the heir and the *jus ad rem* in the creditor. The legal duty of the administrator is to pay all debts that are just and allowed against the estate; the heir in this country is not liable for the debts of the ancestor, but the property of the ancestor is liable; first, the personal, and, in default of

[1] Pry's Appeal, 8 Watts, 253; Kelly's Estate, 11 Phila. 100.

[2] Phelps v. Miles, 1 Root, 162; Reynolds v. May, 4 G. Greene, 283; Pursley v. Hayes, 22 Iowa, 81.

[3] Davis v. Vansands, 45 Conn. 600.

[4] See § 138 and notes.

that being sufficient, the real estate, that descends to the heir subject to this charge for the debts, on the condition named.[1]

The heir is as fully before the court as the creditor, and should take notice of the proceedings therein; but in most of the states the law requires, when the administrator applies for an interlocutory order to sell, that the heir, or his grantee of the estate that descended to him, be notified of the application to sell, or that notice of the sale be given him. In

[1] Watkins v. Holman, 16 Pet. 62: "In the first place, it is contrary to the general practice of many of the states, and to the received notions of the profession on the subject. Titles in Ohio and in many other states to a vast amount of real property rest upon sales of executors and administrators under the order of a court, without making the heirs parties, and it is believed that a doubt of the validity of such titles, where the proceedings have been regular, has never been entertained or expressed. These titles have been contested in state courts and in this court; and a defect of power to convey a good title in the mode authorized, it is believed, has never been objected. A course of proceeding so extensive, involving interests so great, and which has been subjected to the severest legal scrutiny, is no unsatisfactory evidence of what the law is. But, on principle, this proceeding is sustainable. On the death of the ancestor, the land owned by him descends to his heirs. But how do they hold it? They hold it subject to the payment of the debts of the ancestor, in those states where it is liable to such debts. The heirs cannot alien the land to the prejudice of creditors. In fact and in law they have no right to the real estate of their ancestor except that of possession, until the creditor shall be paid. As it regards the question of power in the legislature, no objection is perceived to their subjecting the lands of the deceased to the payment of his debts, to the exclusion of his personal property. The legislature regulates descents and the conveyance of real estate. To define the rights of debtor and creditor is their common duty; the whole range of remedies lies within their province. They may authorize a guardian to convey the lands of an infant, and indeed they may give the capacity to the infant himself to convey them. The idea that the lands of an infant which descend to him cannot be made responsible for the payment of the debts of the ancestor, except through the decree of a court of chancery, is novel and unfounded. So far from this being the case, no doubt is entertained that the legislature of a state have power to subject the lands of a deceased person to execution in the same manner as if he were living. The mode in which this shall be done is a question of policy, and rests in the discretion of the legislature. The law under which the lot in dispute was sold decides no fact binding on creditors or heirs. If the administratrix and Brown have acted fraudulently in procuring the passage of this act, or in the sale under it, relief may be given on that ground. But the act does nothing more than provide a remedy, which is strictly within the power of the legislature."

some states, however, the administrator has the same power over the real estate that he holds over the personal estate.[1]

The purpose of the sale is to relieve the residue of the estate of the lien for the debts and permit its distribution free from it or other burdens; and the realty is, for the purpose of paying the debt, in the hands of the court, and the sale is an incidental matter that arises in the settlement of the estate. The application of the administrator for the order to sell the land is not an independent proceeding, but one that may arise in the settlement of every estate.

The notice, when required, is not a jurisdictional one, nor are the proceedings adversary, except in the sense that the statute gives the right to, or prescribes the rule for, such notice; and in the view of the writer the rule laid down by the supreme court of the United States in Grignon's Lessee v. Astor, 2 Howard, 319, and constantly adhered to by that high court, is correct in principle.[2] There has been notice given to the

[1] Freeman on Executions, sec. 286; Ware v. Bradford, 2 Ala. 676; 36 Am. Dec. 427; Brooks v. Rooney, 11 Ga. 423; 56 Am. Dec. 430; Solomon v. Peters, 37 Ga. 255; Howard v. North, 5 Tex. 290; 51 Am. Dec. 769; Draper v. Bryson, 17 Mo. 71; 57 Am. Dec. 257; Minor v. Natchez, 4 S. & M. 602; Burton v. Spiers, 92 N. C. 503; Maddox v. Sullivan, 2 Rich. Eq. 4; 44 Am. Dec. 234; Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475; Evans v. Robberson, 92 Mo. 192; 1 Am. St. Rep. 701; Hendrick v. Davis, 27 Ga. 167; 73 Am. Dec. 726. *Contra*, Hughes v. Watt, 26 Ark. 228; Lafferty v. Conn, 3 Sneed, 221; Herrick v. Ammerman, 32 Minn. 544; Prater v. McDonough, 7 Lea, 670; Henderson v. Hays, 41 N. J. L. 387; Hinson v. Hinson, 5 Sneed, 322; 73 Am. Dec. 129. For form and contents of notices of sale, see note to Hoffman v. Anthony, 75 Am. Dec. 704 to 713.

[2] Morrow v. Weed, 4 Iowa, 77; 66 Am. Dec. 122; Little v. Sinnett, 7 Iowa, 324; Minor v. Natchez, 4 S. & M. 602; Bland v. Muncaster, 24 Miss. 62; 57 Am. Dec. 162; Hanks v. Neal, 44 Miss. 212; McNair v. Hunt, 5 Mo. 300; Cooley v. Wilson, 42 Iowa, 428; Hudgens v. Jackson, 51 Ala. 514; Moffit v. Moffit, 69 Ill. 641. Comstock v. Crawford, 3 Wall. 404: "The proceeding for the sale of the real property of an intestate, though had in the general course of administration, is a distinct and independent proceeding authorized by statute only in certain specially designated cases. But when by the presentation of a case within the statute the jurisdiction of the court has once attached, the regularity or irregularity of subsequent steps can only be questioned in some direct mode prescribed by law. They are not matters for which the decrees of the court can be collaterally assailed. The statute of the territory provided that the real estate of a decedent might be sold to satisfy the just debts that he owed, when the personal property of the estate was insuffi-

world by the administrator at the time of his appointment and all parties are before the court. The only right to be affected is the naked title or fee of the land that rests temporarily in the heir, subject to be divested by the court in the

cient to pay the same. And it authorized the probate court of the county where the deceased last dwelt, or in which the real estate was situated, to license the administrator to make the sale upon representation of this insufficiency, and 'the same being made to appear' before the court. It also required the court, previous to passing upon the representation, to order notice to be given to all parties concerned, or their guardians, who did not signify their assent to the sale, to show cause why the license should not be granted. As thus seen, the representation of the insufficiency of the personal property of the deceased to pay his just debts was the only act required to call into exercise the power of the court. The truth of the representation was a matter for subsequent inquiry. How this should be made to appear the statute did not designate; but from the notice required of the hearing upon the representation; it is clear that the necessity and propriety of the sale solicited were matters to be then considered. A license following such hearing necessarily involved an adjudication upon these points. The jurisdiction to hear was conferred by the representation, the authority to license followed from the fact which the court was required to ascertain and settle by its decision. In such case the decision of the court is conclusive. The record of the probate court, produced by the defendant, states the fact that a written application for the sale was made. It sets forth the application at length, representing that the personal property of the deceased was insufficient to pay his just debts by the sum of about $8,000; it gives the order directing publication of notice of the application; it recites that due notice was given; it contains a certificate of the probate justice of Illinois that the personal property of the deceased had been exhausted in payment of his debts, and that there remained debts unpaid to the amount named; and it states, by way of further recital, that it had been made to appear to the court that the sale was necessary and proper to pay such debts of the existence and amount of which due proof had been given. To this record it is further objected: 1st. That the representation, which was the preliminary step in the proceeding for the sale, did not give the amount and description of the personal property of the deceased, or a statement of the just debts which he owed; and 2d. That the order for the sale did not show that the personal property of the estate was insufficient to pay the debts, unless resort was had to the certificate of the probate justice of Illinois. The answer to the first objection is found in the fact that the statute did not require any such particularity of statement with reference to the property of the deceased, or to the debts which he owed. It only required a representation of the general fact. The particularity desired to guide the court was to be obtained at the hearing of the application. The answer to the second objection is, that the sufficiency of the proof upon which the court took its action is not a matter open to consideration in a collateral manner. It does not touch the ques-

proceedings before it; the lien of the creditors is fixed by the order of allowance, and the court has complete jurisdiction of the settlement of the estate. The notice required will be presumed to have been given, and if not, the presumption is that the heir will call the attention of the court to the omission in order that he may defend. In a collateral proceeding, it will be presumed that notice was given and all things regularly done. Such notice is a mere statutory notice in applying for the interlocutory order for the sale, and the failure to give it is a mere irregularity.[1] On this important question we have given the authorities on both sides; they are not only numerous but conflicting.

The writer's view is that the order of sale is an interlocutory order and should be treated as such; that the presumption is that the required notice has been given; that the statute requiring notice is not mandatory, and hence that jurisdiction is not dependent upon compliance with it. A sale made without notice is simply voidable; and where objection to the sale is made by the heir on the ground that he had not been notified, the omission should be corrected by appeal in the original proceeding; the order of sale is not subject to collateral attack on that account.[2]

§ 142. General remarks on judicial sales and what renders them void.— As stated in the first chapter of this work, the necessary elementary principle upon which jurisdiction rests is that the requisite initiatory steps have been taken and the facts must exist which give the court power to act; therefore where the decedent left a will that will must be pro-

tion of jurisdiction. Similar questions were presented for the consideration of this court, in Grignon's Lessee v. Astor, 2 How. 319. That case turned upon the validity of proceedings for the sale of real property of an intestate under a statute almost identical in its provisions with the one under which the sale in the present case was made. And it was there held that the representation was sufficient to bring the power of the court into action; that it was enough that there was something of record which showed the subject before the court; and that the granting of the license was an adjudication upon all the facts necessary to give jurisdiction. That decision disposes of the particular objections stated to the sale in this case." Florentine v. Barton, 2 Wall. 210; Mohr v. Manierre, 101 U. S. 425; Hall v. Law, 102 U. S. 464.

[1] See § 60, notes; also chapter 7 and notes.

[2] See § 64, notes, and chapter 7 and notes.

bated; and if he died intestate, there must be an administrator appointed; there is no power in the court to proceed in the settlement of the estate without the aid of the one or the other of these functionaries. If these proceedings are radically defective, all subsequent steps, however regular they may be, are nugatory for want of a legal plaintiff or officer to act. Hence, a judicial sale would be void if made before a will, properly before the court, was probated, or probated without the notice required by law. See remarks of Mr. Justice Cole in Reynolds v. Schmidt:[1] "By the probate court having jurisdiction is obviously meant the probate court of the county where the deceased resided at the time of his death, and which had jurisdiction of the estate;" and in Chase v. Ross, Lyon, Justice, remarks: "Before a step can be taken towards granting such license (referring to the license to sell by the administrator) there must be a lawful executor or administrator. In no correct sense can it be said that the court has jurisdiction of the estate before proper proceedings are instituted therein to prove the will (if there be one) or appoint an administrator."[2] It may also be shown that an apparent grant

[1] 20 Wis. 374.

[2] Chase v. Ross, 36 Wis. 273: "For reasons which will be briefly stated, we think that the proofs thus made and offered fail to raise a presumption that any of the records and papers concerning the estate of Bedient have been lost. (1) There is no testimony tending to show that those records or files were carelessly kept. True, they were kept in the business office of the clerk of the county judge; but it does not appear that both were not careful men and that the records and papers were not kept as safely as they would have been in any other place. (2) Although it appears that documents in that office were not promptly recorded, yet that fact raises no presumption that they were not all preserved. (3) The notice of February 13, 1852, does not aid such presumption, because it was not a sufficient notice. The first Monday in March, 1852, the day appointed for the hearing, was the first day of that month, as will appear by a reference to the calendar of that year. The order of the county court required the notice to be published for four weeks, and the statute required a publication thereof for three weeks, before the hearing. R. S. 1849, ch. 66, sec. 18. The publication was made only seventeen days before the day appointed for the hearing, and was therefore insufficient. The earliest day the hearing could lawfully be had was Friday, March 5th. See Eaton v. Lyman, 33 Wis. 34. The fair inference is that no hearing was had pursuant to such defective notice. Had it appeared that there was a legal publication of such notice, it may be that the presumption would be different. But we do not determine that point. (4) Although the county court seems

of administration was made by a person not the court or judge thereof, but by one that used blanks signed by the judge; and as judicial authority cannot be delegated, the act of such person in filling the blanks is not a judicial act, and is void.[1] Where an action against an infant was in its nature transitory (to cancel a contract), the infant being a non-resident of the state, the court, by personal service out of its jurisdiction, did

to have acted upon the hypothesis that Bedient left a last will and testament, it is not stated or recited in any of the proceedings that the same was ever admitted to probate. It may also be observed that after Mrs. Bedient declined to take under the will, there being but one heir, to whom and to the widow the whole was given, the estate would necessarily be distributed the same as though Bedient had died intestate. This furnishes a probable reason why the will might have been considered of no importance, and why formal probate thereof was not made. . . . It remains to be considered in what manner the sale of the land in controversy is affected by the want of jurisdiction in the county court to appoint such administrator. In Sitsman v. Pacquette, 13 Wis. 291, it was held that a sale under such circumstances is void. Mr. Justice Cole dissented in that case, but on other grounds. It is understood that he concurred in the proposition just stated. The same doctrine was held or recognized as correct in the subsequent cases of Bailey v. Scott, id. 618; Frederick v. Pacquette, 19 id. 541, and Showers v. Pacquette, mentioned in the latter case. But Sitsman v. Pacquette was ruled by the Revised Statutes of 1839, which do not contain the provisions found in the revision of 1849, chapter 65, section 52, re-enacted in the revision of 1858, chapter 96, section 62 (Tay. Stats. 1193, sec. 62). That section is as follows: 'In case of an action relating to any estate sold by an executor, administrator or guardian, in which an heir or other person claiming under the deceased, or in which the ward, or any other person claiming under him, shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: 1. That the executor, administrator or guardian was licensed to make the sale by the probate court having jurisdiction. 2. That he gave a bond, which was approved by the judge of probate, in case a bond was required on granting a license. 3. That he took the oath prescribed in this chapter. 4. That he gave notice of the time and place of sale, as in this chapter prescribed. 5. That the premises were sold accordingly, and the sale confirmed by the court, and that they were held by one who purchased them in good faith.'" Sumner v. Parker, 7 Mass. 79; Unknown Heirs v. Baker, 23 Ill. 490; Smith v. Rice, 11 Mass. 507; Withers v. Patterson, 27 Texas, 501; Ex parte Barker, 2 Leigh, 719; Miller v. Jones, 26 Ala. 247.

[1] Reynolds v. Schmidt, 20 Wis. 374; Roderigas v. East River Sav. Inst. 76 N. Y. 316; S. C. 32 Am. Rep. 309, and note; Childs v. Hayman, 72 Ga. 791; Young's Administrator v. Rathbone, 16 N. J. Eq. 224; 84 Am. Dec. 151. But see Bunce v. Bunce, 59 Iowa, 533.

not obtain authority to appoint a guardian *ad litem* to appear for the infant, and judgment rendered pursuant to such a service and appointment was void.[1] But where the proceedings are *in rem*, which is true in every instance where the property is in the state and brought under the control of the court, or real property lies in the state, then constructive service is good.[2]

Where the statutes of the state make no provision for the sale of the estate or lands of persons who died prior to their enactment, then an attempt to administer on an estate not so provided for is invalid and a usurpation of jurisdiction.[3] So, if the court should order the sale of lands out of its jurisdiction and lying in another state;[4] and such rule has been applied to personal property out of the state at the death of the owner and afterward brought within the state.[5]

If the decedent was a resident of the state, and died in a county other than that of his residence, and administration was there granted, whether the fact of his true residence appeared or not, the court would acquire no jurisdiction, for the jurisdiction is at the place of residence of the deceased.[6] But if it appeared that proper notice was given, and an allegation was made that the death occurred at the place of residence, then the finding of that fact judicially would be conclusive in

[1] Ins. Co. v. Bangs, 103 U. S. 435; Belcher v. Chambers, 53 Cal. 639.

[2] Anderson v. Goff, 72 Cal. 65; S. C. 1 Am. St. R. 34; Freeman v. Alderson, 119 U. S. 285; O'Sullivan v. Overton, 56 Conn. 102.

[3] Downer v. Smith, 24 Cal. 114; Coppinger v. Rice, 33 Cal. 408; Grimes v. Norris, 6 Cal. 621; S. C. 65 Am. Dec. 545; Adams v. Norris, 23 How. (U. S.) 353; Tevis v. Pitcher, 10 Cal. 465; McNeil v. First Congregational Society, 4 W. C. Rep. 421; S. C. 66 Cal. 105.

[4] Nowler v. Coit, 1 Ohio, 519; S. C. 13 Am. Dec. 640; Salmond v. Price, 13 Ohio, 368; S. C. 42 Am. Dec. 204; Watts v. Waddle, 6 Pet. 389; Wills v. Cowper, 2 Ohio, 313; Latimer v. R. R. Co. 43 Mo. 105; S. C. 97 Am. Dec. 378; Price v. Johnston, 1 Ohio St. 390.

[5] Varner v. Bevil, 17 Ala. 286.

[6] Beckett v. Selover, 7 Cal. 215; S. C. 68 Am. Dec. 237; Haynes v. Meeks, 10 Cal. 110; S. C. 70 Am. Dec. 708; Harlan's Estate, 24 Cal. 182; S. C. 85 Am. Dec. 58; Moore v. Philbrick, 32 Me. 102; S. C. 52 Am. Dec. 642; Munson v. Newson, 9 Tex. 109; Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 5 Pick. 20; S. C. 16 Am. Dec. 372; Goodrich v. Pendleton, 4 Johns. Ch. 549; Hoyt v. Sprague, 103 U. S. 613. See *supra*, § 145, note 5; and compare Watkins v. Holman, 16 Pet. 25.

a collateral proceeding.[1] In such case the finding of the court is conclusive.

If the judge of the proper court is disqualified by statute because of being a relative of the parties, or because of interest or any statutory cause, or is a party or interested under common-law principles, his acts will be void.[2] A court can-

[1] Irwin v. Scriber, 18 Cal. 499; Lewis v. Dutton, 8 How. Pr. 103; Andrews v. Avory, 14 Gratt. 236; S. C. 73 Am. Dec. 355; Warfield's Will, 22 Cal. 51; S. C. 83 Am. Dec. 49; Sutton v. Sutton, 13 Vt. 71; Fisher v. Bassett, 9 Leigh, 119; S. C. 33 Am. Dec. 227; Barrett v. Garney, 33 Cal. 530; Driggs v. Abbott, 27 Vt. 580; S. C. 65 Am. Dec. 214; Burdett v. Silsbee, 15 Tex. 615; Monell v. Dennison, 17 How. Pr. 422; Abbott v. Colburn, 28 Vt. 663; S. C. 67 Am. Dec. 735; Raborg v. Hammond, 2 H. & G. 42. See, also, Riley v. McCord, 24 Mo. 265; Wight v. Wallbaum, 39 Ill. 554.

[2] Keeler v. Stead, 56 Conn. 501; S. C. 7 Am. St. R. 320; Sigourney v. Sibley, 21 Pick. 101; S. C. 32 Am. Dec. 248; Coffin v. Cottle, 9 Pick. 287; Gay v. Minot, 3 Cush. 352. Hall v. Thayer, 105 Mass. 222; S. C. 7 Am. Rep. 513: "In Williams v. Robinson, 6 Cush. 333, the principle is stated in application to a police court; and where the judge had heard the plaintiff state the facts in a case, and thereupon has a bias or prejudice in his favor, it was held that he properly declined to act in the case, and called in the special justice on the ground that he could not properly take jurisdiction. In Sigourney v. Sibley, 21 Pick. 101, it was held that, where a judge of probate had a claim against the estate of a deceased person, he had no jurisdiction as to the settlement of the estate, though he did not intend to enforce his demand. It was held that the amount of his claim was immaterial till a statute was passed limiting the disqualification to cases where his claim exceeded $100, exclusive of interest. Gen. Stats. ch. 119, sec. 4. This is, perhaps, a reasonable limitation. If the judge is interested as a debtor to the estate he is disqualified. Gay v. Minot, 3 Cush. 352. So if he is a creditor merely in his capacity of executor of another estate. Bacon, Appellant, 7 Gray, 391. But the interest must be legal or beneficiary, and not a mere general interest in the prosperity of the town he lives in. Northampton v. Smith, 11 Metc. 390. The principle applies to county commissioners, though they are not judicial officers. It was decided that the interest which an inhabitant of a town has in the laying out of a highway which runs partly through the town did not disqualify him from acting as a commissioner in laying out the way; nor the fact that his brother was one of the signers of a petition for laying out the way. Wilbraham v. County Commissioners, 11 Pick. 322. But not long after this decision was made the legislature passed an act, which is still in force, disqualifying a commissioner from acting in respect to a road if any part of it lies within the town where he resides. Gen. Stat. ch. 17, sec. 12; Tolland v. County Commissioners, 13 Gray, 12. The principle applies to a juror. Davis v. Allen, 11 Pick. 466. Also to an appraiser of land set off on execution. The sheriff appointed a

not appoint a new executor or administrator, where one has been appointed, without removing the former one, nor after the estate has been administered upon, nor after the statutory time for granting original administration has expired.

brother-in-law of the creditor as an appraiser, and the levy was held void for that reason. Wolcott v. Ely, 2 Allen, 338; McGough v. Wellington, 6 Allen, 505. It applies to a referee, though referees are selected by the parties, unless the objection is known and waived. Fox v. Hazelton, 10 Pick. 275; Strong v. Strong, 9 Cush. 560, 574. . . . The facts are that Warren Hunt had died intestate, the will had been proved, the executor named in the will had taken upon himself the trust, and had represented the estate insolvent; commissioners had been appointed to receive and examine claims, and then the executor had resigned his trust and was discharged. Soon afterward, namely, March 2, 1869, Edward C. Thayer and Fenner Batchellor were upon their own application appointed administrators with the will annexed. Thayer was a brother of the judge's wife, and her father was, and had been from the first, a large creditor of the estate, and proved his claim before the commissioners. A creditor, though he is interested as such in the administration of the estate, is not thereby disqualified to be administrator. On the contrary, by General Statutes, chapter 94, section 1, a principal creditor has a right to be appointed if the widow and next of kin do not act, and it is generally the case that administration is committed to persons having not only a pecuniary interest in the estate, but being related to the parties in interest. But the duties of the office are executive and not judicial, and in all his acts an executor or administrator is strictly accountable to the judge of probate at the instance of any party interested. If no one appears to take administration, the judge of probate appoints such person as he deems fit. The whole proceeding requires impartiality on the part of the judge; an impartiality that disqualifies him to act where a father-in-law or a brother-in-law is a party, and takes away his jurisdiction. The defect is incurable. It does not depend upon the motives with which the judge acted. No wrong motives are imputed to the judge in this case. But it is said by Chief Justice Shaw in Gay v. Minot, 3 Cush. 354, that the case being *coram non judice*, the first probate was not voidable merely, but void, incapable of being made good by confirmation, waiver or ratification, on the part of those interested. The same is true of county commissioners. Tolland v. County Commissioners, 13 Gray, 12. This was said in application to a case where the judge was merely indebted to the estate in a small note secured by mortgage, and the executors had been named by the testator, and after probate of the will they had sold the note for its full value. We cannot doubt that this case is within that principle, and that some other judge should have been called to act in conformity with the provisions of the statute." Griffith v. Frazier, 8 Cranch, 9; Fisk v. Norvel, 58 Am. Dec. 128; S. C. 9 Tex. 13; Wales v. Willard, 2 Mass. 120.

§ 143. Mode of invoking sale.— As we have before shown there must be not only a suitable party plaintiff authorized to act in the sale of property left by decedents, but there must be a sufficient petition to invoke the action of the court, and although it may be very general in its main features, it must comply with statutory conditions; for the sale of real estate is generally dependent on a lack of personal assets to pay the debts, and the petition must show the necessity for the sale as provided by statute. The failure to show such statutory foundation for the order of sale is not a mere irregularity; it affects the jurisdiction. The law will not uphold a sale that is made in disregard of the directions of the statute.[1] There is no general authority existing in law, or common-law authority, for the sale of the real estate of a decedent; hence the disposition, sale and mode thereof must conform to the statutes of the state. The petition invokes the authority of the court to act; the order must not be broader than the prayer; the petition furnishes the basis for the judgment.[2] The policy of the law is to preserve the real estate for the heir. In fact, the fee descends to the heir, and the title cannot be divested except in the manner provided by law. Therefore where the account set forth does not show a deficiency of personal assets, such failure has been treated in New York as necessarily jurisdictional.[3] The failure to verify a petition required to be verified is not jurisdictional; neither is the absence of a sale bond, nor irregularity in the notice.[4] If more land is ordered

[1] Teverbaugh v. Hawkins, 82 Mo. 180; Alabama Conference v. Price, 42 Ala. 39; Wyatt's Adm'r v. Rambo, 29 Ala. 510; S. C. 68 Am. Dec. 89; Ethell v. Nichols, 1 Idaho (N. S.), 741; Finch v. Edmonson, 9 Tex. 504. But in Withers v. Patterson, 27 Tex. 499; S. C. 86 Am. Dec. 648, and in Alexander v. Maverick, 18 Tex. 179; S. C. 67 Am. Dec. 695, it was intimated that the absence of a petition might not be fatal, and it was so decided in Rumrill v. First Nat. Bank, 28 Minn. 202; Marvin v. Schilling, 12 Mich. 356. See Mohr v. Porter, 51 Wis. 487; Mohr v. Tulip, 40 id. 66; Bompart v. Lucas, 21 Mo. 598; Farrar v. Dean, 24 Mo. 16; Newcomb v. Smith, 5 Ohio, 448; Strouse v. Drennan, 41 Mo. 298; Beal v. Harmon, 38 Mo. 435; Ikelheimer v. Chapman, 32 Ala. 676; Sanford v. Granger, 12 Barb. 392; Woodruff v. Cook, 2 Edw. Ch. 259; Cornwall's Estate, 1 Tucker, 250; Hall v. Chapman, 35 Ala. 553.

[2] Pryer v. Downey, 50 Cal. 388; Wilson v. Holt, 83 Ala. 528.

[3] Bloom v. Burdick, 1 Hill, 130; Ford v. Walsworth, 15 Wend. 450; Jackson v. Crawfords, 12 Wend. 553; Forbes v. Halsey, 26 N. Y. 53.

[4] Foster v. Birch, 14 Ind. 445; Lock-

sold than is prayed for by the petition the sale is invalid as to the excess. The description must be intelligible.[1] But we think the better rule is that want of bond and want of oath to petition, or oath of officer making the sale, should not be regarded as jurisdictional. The parties are before the court, and it is the duty of persons adversely interested in the sale to look to these things and call the attention of the court to the defect before confirmation, or before the order is entered; and a party should not be permitted to neglect to mention such defects and then attack the decree because of them, after a purchaser has paid for the land and bought under proper authority. The purchaser is not required to look beyond jurisdictional facts in purchasing.[2] Administrators' sales and

hart v. John, 7 Pa. St. 137; Arrowsmith v. Harmoning, 42 Ohio St. 254; Moody v. Butler, 63 Tex. 210; Trumble v. Williams, 18 Neb. 144. Hamiel v. Donnelly, 75 Iowa, 95: "It is claimed that the proceedings were void because the petition for the order to sell was not sworn to, and the notice of the application for the sale was served on the plaintiffs on the 14th day of August, 1887, and the guardian was not appointed until three days afterwards. No objection is made to the form of the notice, nor to the manner of service. It does not appear when the application for the appointment of the guardian was made. The circuit court, with the whole record before it, determined that due and legal service of the pending of the application had been made upon the said minors. It was therefore not a case of non-notice, but the same was probably served before it should have been. Under these circumstances it is well settled in this state that the judgment or proceeding is not void for want of jurisdiction of the person. Shawhan v. Loffer, 24 Iowa, 228, and Bunce v. Bunce, 59 id. 583, and cases there cited. In regard to the omission to verify the petition, it is scarcely necessary to say that the defect is in no sense jurisdictional, and the same may be said of the objection that the bond given by the guardian was approved by the clerk of the court in vacation, and not by the court." Campbell v. Knights, 26 Me. 224; S. C. 45 Am. Dec. 107; Wilkinson v. Filby, 24 Wis. 441; Parker v. Nichols, 7 Pick. 111; Blackman v. Baumann, 22 Wis. 611; Williams v. Reed, 5 Pick. 480; Cooper v. Sunderland, 3 Iowa, 114; S. C. 66 Am. Dec. 52; Thornton v. Mulquinne, 12 Iowa, 549; Wiley v. White, 3 Stew. & P. 355; Currie v. Stewart, 26 Miss. 646; Babcock v. Cobb, 11 Minn. 347; Rucker v. Dyer, 44 Miss. 591; Perkins v. Fairfield, 11 Mass. 226; Cohea v. State, 34 Miss. 178; Hamilton v. Lockhart, 41 Miss. 460; Washington v. McCaughan, 34 Miss. 304; Williams v. Morton, 38 Me. 47; S. C. 61 Am. Dec. 229; Barnett v. Bull, 81 Ky. 127; Williamson v. Williamson, 3 S. & M. 715; S. C. 41 Am. Dec. 636.

[1] See Tenny v. Poor, 14 Gray, 502; 77 Am. Dec. 340 and notes; Smitha v. Flournoy, 47 Ala. 345. See, however, Bryan v. Bauder, 23 Kan. 95.

[2] Wyman v. Campbell, 6 Porter, 219; S. C. 31 Am. Dec. 677; Palmer v. Oakley, 2 Doug. 433; S. C. 47 Am.

guardians' sales are in their nature so nearly allied that rules applicable to one govern the other, unless the statute makes a distinction. Both are judicial sales, and no distinction need be made in determining the jurisdictional facts applicable, unless it is made in the statutes of the state.

§ 144. In the matter of invoking the jurisdiction of the court in the allowance of claims against the estate.— In nearly all the states, we think in all, the statutes prescribe a time in which claims against the estate shall be filed, in order that it may be settled and its proceeds distributed. The several statutes provide various periods of time for the filing of claims, manner of proof, and the like. Usually a short time is named after notice of the appointment of an administrator and notice to creditors to file claims; the reader must consult the statute. Some states give equitable relief where excuse is shown for not complying with the order, and in nearly all provisions are made for such relief where reasons are shown why the claim was not sooner presented. It has been held that the fact the claim was not filed within the statutory period does not deprive the court of jurisdiction, but it may hear the claim and allow it.[1] When the claim is allowed,

Dec. 41; Bunce v. Bunce, 59 Iowa, 533; Watts v. Cook, 24 Kan. 278; Mobberly v. Johnson, 78 Ky. 273; McKinney v. Jones, 55 Wis. 39; Mohr v. Porter, 51 id. 487; Mohr v. Tulip, 40 id. 66.

[1] McLeary v. Doran, 79 Iowa, 213: "The present proceedings were commenced on the 26th day of March, 1888, and the papers filed by the plaintiffs attack the report, and except thereto, on the ground that the claim of said Day was invalid and void; not filed nor proved within the proper time; that the estate had before that been settled up and proceeds distributed to the heirs, and that the court was without jurisdiction to try and determine the validity of said claim. The administrator did not file any resistance to said claim. This was not necessary. It was his right to resist its allowance without any pleading on behalf of the estate (Code, sec. 2410); and the order allowing the claim shows that the failure to file within one year was called to the attention of the court, and it was held that said claim was not barred by the statute of limitations. It is claimed in behalf of appellants that the order allowing the claim is void on the face of the record, because the claim was filed after the expiration of one year from the giving of notice of administration, and it contained no averment of any equitable circumstances which would excuse the failure to file and prove the same within the year. This may be a good reason for compelling the claimant to amend the statement of his claim, but the defect did not, in our opinion, affect the jurisdiction of the court. The claim was not demurrable upon its face because it

it is in the nature of a judgment, and can only be impeached for fraud, mistake or collusion, and it stands on a par with a judgment at law in many respects pertaining to its validity in

did not appear therefrom that it was not filed within the proper time. Even if it had so appeared, and a demurrer could have been interposed, that would not affect the jurisdiction of the court. It is further urged that the order was void because no notice was given to the administrator of the hearing of the application for the allowance. The record shows that the administrator was present at the hearing, and that he had an exception entered to the order; and the report which he subsequently made shows that he was present and employed counsel, and resisted the claim. The object of the notice is to enable the administrator to be present at the hearing and interpose proper defenses to the claim, and it has uniformly been held that where a defendant appears to an action he cannot be allowed to claim that he was not served with notice; and we see no reason why the same rule should not apply to administrators as well as other parties. It appearing upon the face of the record that the court had jurisdiction to try and determine the validity of the claim in controversy, the question for determination is, have the heirs of the decedent any right to question the adjudication by exception to the report of the administrator? It is provided by section 2474 of the code that mistakes in settlement may be corrected after final settlement, on showing such grounds of relief in equity as will justify the interference of the court. This statute was evidently intended as a protection to heirs against mistakes or fraudulent acts of administrators. No authority is found therein for a proceeding to vacate an order of the court allowing a claim upon a hearing, unless it be made to appear that there was fraud or collusion between the administrator and the claimant; and we do not think the plaintiffs are entitled to the relief provided for by section 2475 of the code, because they do not make any attack upon a settlement of the accounts of the administrator in their absence and within three months. They demand that an order made by the court on a final hearing shall be vacated and set aside. The law provides that claims against an estate shall be entitled in the name of the claimant and against the executor, that a trial by jury may be allowed, and that all proceedings of law applicable to an ordinary proceeding shall apply. Code, secs. 2409, 2411. No other person is required to be made a party to the proceeding. Now, what is sought by the plaintiffs is not an order requiring the administrator to strike the allowance of Day from the settlement and account to the estate the same as though no order had been made; but they propose to readjudicate the claim as to the defendant Day. It is apparent that, if this may be done, the hearing provided by statute is a mere preliminary examination, subject to be impeached and tried over again at the instance of the heirs, and the settlement of estates would thus be attended with serious embarrassments. The administrator and the claimant are the proper parties to the proceeding, and if the administrator is guilty of maladministration in allowing a claim, or colluding with a claimant, the heirs have recourse against him and his sureties. But no such charge is made against the defendant Doran.

the state where rendered.[1] A different rule would be applied where the property was conveyed by the testator or decedent before his death as a gift or in fraud of his creditors. In such case, and against such holders, the allowance of the claim is not evidence, because such persons are not parties.[2]

If the decision of the court in allowing the claim was erroneous, the error could have been corrected on appeal, and we know of no other way to attack it, unless it be by a proceeding based upon fraud." See Hartman v. Fishbeck, 18 Fed. Rep. 291, holding: Notwithstanding the statutes of the state provide that the county courts shall have jurisdiction over the estates of deceased persons therein, and limit the time within which such claims against such estates must be filed, and actions brought thereon to recover by creditors resident of that state, a citizen of another state, being a creditor of the testator or intestate, cannot be affected by any proceedings under that statute, unless he shall have voluntarily made himself a party to them, so as to impair his constitutional and legal right to sue the executor or administrator in the circuit court of the United States. The circuit court of the United States has jurisdiction of an action by a non-resident creditor against a resident executor or administrator upon a debt of his decedent. The limitation of time within which by the statute the claim must be presented for allowance in the probate court is inseparable from the peculiar procedure prescribed; it is a part of that procedure, and so not like a general statute of limitations, and can only be applied to parties which are bound by such special mode of procedure. See exhaustive notes to this case. This case is referred to, because of the high character of the court, for the reader's examination; but I can hardly believe that in the settlement of estates the rule must be adopted that administrators must retain funds to pay non-residents for the term of years provided by the general statutes of limitations; and such must be the effect if the rule adopted in the above case be the law. The case places the claims of non-residents at an advantage over those of residents.

[1] Cossit v. Biscoe, 12 Ark. 95; McMorrin v. Overholt, 14 id. 244: Clark v. Shelton, 16 Ark. 474; Tate v. Norton, 94 U. S. 750; McLeary v. Doran, 79 Iowa, 218. Some states hold the allowance *prima facie* evidence. Willet v. Malli, 65 Iowa, 678: "Where it becomes a lien upon the debtor's interest (or upon what the courts may treat as such), there is much reason for holding it conclusive as against all others who hold the real estate subordinate to such interest. What precisely the rule is as to the evidence which the probate allowance of the claim becomes as against heirs, it is not very important to determine. It is manifest that they sustain a relation to the administrator different from that of those who have taken property from the decedent by gift, and who are not necessarily interested as against the allowance. But the probate allowance of a claim is not, we think, so far as real property is concerned, conclusive, even as against heirs. Stone v. Wood, 16 Ill. 177; Mason v. Bair, 33 id. 206; Steele v. Lineberger, 59 Pa. St. 308; Hopkins v. Stout, 6 Bush, 375. It is held, it is true, in those cases that it is evidence, but only *prima facie* evidence."

[2] Willett v. Malli, 65 Iowa, 678:

As we have before said, claims filed in probate in one state are not evidence in another against an ancillary administrator. The reason for this rule is obvious, as the administrator may admit or allow the claim, and the estate may be insolvent in the state where allowed; and there is no privity of contract or duty between the two officers.[1] The same rules apply to the reports of the administrator. After confirmation, such reports cannot be set aside for other cause than fraud or mistake, or equitable cause, and stand on the same footing as reports made by a master in chancery after confirmation.[2] This does not prevent the court of probate from setting aside the report on other grounds, while the case is pending and before the estate is distributed.[3]

§ 145. The nature and effect of judgments in probate and the jurisdiction.— Looking a little closer to the nature of claims filed by creditors of the estates of decedents, the administrator or executor represents the heirs and legatees in their settlement under the statutes of most if not all the states. His duty is to allow or reject claims filed and contest their validity where he has reason to question the justness thereof. Notice of the hearing of the claim is served on him. As we

"We see no way, then, in which the plaintiff can be sustained, except by holding that the allowance was conclusive upon the defendants, and such ruling, it appears to us, would be unwarranted. In Bump. Fraud. Conv. 539, the author, while stating that the record of a judgment against the debtor is competent evidence against his grantee, says: 'A judgment rendered against the debtor's administrator, whether domestic or foreign, is not competent evidence against the grantee,' citing McDowell v. Goldsmith, 24 Md. 214; Baker v. Welch, 4 Mo. 484; Osgood v. Manhattan Co. 3 Cow. 612. See, also, Donley v. McKiernan, 62 Ala. 34; Winslow v. Grindal, 2 Greenl. 64; Beckett v. Selover, 7 Cal. 215; Buckham v. Grape, 65 Iowa, 535. The plaintiff contends that the defendants are concluded by the allowance, because they made themselves parties to it by volunteering to resist it. We are inclined to think, though the evidence is not very clear, that the defendants took counsel, and contemplated the employment of attorneys to assist the administrator in resisting the claim. But no appearance was made for the defendants in the case, nor were their attorneys, if they had any, present at the trial. Whatever was done by the defendants, if anything, it appears to us, fell far short of making them parties to the allowance."

[1] See § 132.

[2] See Tate v. Norton, 94 U. S. 746, and authorities cited; Patterson v. Bell, 25 Iowa, 149; Kows v. Mowery, 57 id. 20; In re Heath's Estate, 58 id. 36.

[3] Shoemaker v. Brown, 10 Kan. 383; Chase v. Ross, 36 Wis. 267.

have before said, he may compromise doubtful claims, refer them to arbitration and control the defense; and the beneficiaries, or heirs of the estate, are represented through him. Where the administrator is the real party defendant, and the creditor files and proves his claim in the court, and an order of allowance is made by the court, we cannot see on what principle the heirs can contest the validity of the claim on the application by the administrator to sell real estate, any more than if the administrator sought to pay for personalty; for if the validity of the claim is established for one purpose it is for another. The creditor is not a party to such contest, and he has done all that is required of him; but inasmuch as the administrator may not be conversant with all the facts, such allowance of a claim might be set aside on less evidence for fraud or mistake than in cases of ordinary judgments.[1] It

[1] See § 143 and notes. Ashton v. Miles, 49 Iowa, 568: "Another exception is based upon the fact that the report shows a payment by the administrator to himself of a certain claim allowed in his favor. But the real matter complained of is not an error in the report, but a wrongful act in obtaining the allowance of the claim. The appellants aver that the true amount due the administrator was only about $180, but that by fraudulent collusion with the special administrator he obtained an allowance of $652.98. Where an administrator, as a pretended creditor of the estate, procures an allowance of his claim by fraud, it would be the duty of the court, in a proper proceeding for that purpose, to set the allowance aside. Code, sec. 2474. But we do not think it can be done by a mere exception to his report. An allowance of a claim against an estate, although not a judgment, is the result of an adjudication. There must be the same presumption in its favor as in favor of a judgment. If it is to be assailed upon the ground that it was fraudulently obtained, it should be done, we think, in an action brought for that purpose, with the proper averments and parties. But whether the appellant's method of raising the question was proper or not, it appears that the court below proceeded to try the question. A large amount of evidence was taken, and we think that the action of the court in overruling the exception is not without support. Having the force of a verdict upon a question of fact it cannot be disturbed. Another exception to the report is that it shows certain expenditures which were improper, and ought not to have been allowed. The proper time to contest such items was when the report was approved, unless opened, as it might be on proper showing, within three months. Patterson, Administrator, v. Bell, 25 Iowa, 149. This, perhaps, would be conceded by appellants, but they say that they made their objections to the report within three months from the final action of the court. The fact is they made their objections nearly a year after the report was approved, but only a few days after the record entry was

has been held, where extra compensation has been given to an administrator for extraordinary services in settling an estate, that the order of the court in making such allowance would

changed." Beckett v. Selover, 7 Cal. 215; Estate of Schroeder, 46 Cal. 318; Stone v. Wood, 16 Ill. 177; Gold v. Bailey, 44 Ill. 491. Smith v. Brown, 101 N. C. 347; 7 S. E. Rep. 890: "Upon an examination of these enactments, which are not in terms entirely similar, it will be seen that the first requires creditors to 'make their claims' within the designated time, or, failing to do so, they will 'be forever barred,' having reference to the creditor's inaction meanwhile; and it is too plain to need argument to show that creditors who do sue and reduce their debts to judgment make their claim in a most efficient manner in doing so. Of whom else could the demand be made, unless of him who represents the debt, and has in his hands the personal, and may have the proceeds of the real estate sold when necessary to increase the assets to a sum sufficient to pay the indebtedness? Where such presentation of the debt is made and followed by an action, the requirements of the act of 1715 are met, and it can have no further application. After the rendition of judgment a new cause of action, between living persons, springs up, where any action can be maintained and is enforced under other and differing statutory provisions, and none can be supported upon the original cause of action against the representative or any one else. The argument to the contrary derives apparent support from the reasoning — none from the ruling — in Bevers v. Park, 88 N. C. 456, the erroneous inferences drawn from which we endeavored to correct in Speer v. James, 94 N. C. 417. We now propose to add to the latter by reference to previous positive and direct adjudications upon the question of the effect of a judgment rendered against the personal representative, when it is sought to subject the descended or devised lands to its satisfaction, by converting them into assets in aid of the personal estate. The cases to which we refer were bills filed in the court of equity by the personal representative to have his expenditures in excess of assets reimbursed out of the real estate. In Williams v. Williams, 2 Dev. Eq. 69, Ruffin, J., delivering the opinion, thus speaks: 'It is only a debt in this court upon its principle of substitution, which places the administrator here, as the law does, as an assignee of the debt. No injury can arise to the heir, but rather a benefit, by the jurisdiction. The personal estate is still the primary fund, and hence the administrator *de bonis non* is a necessary party, and the heir is at full liberty to show assets in the hands of either the first or last administrator. The debt is fixed conclusively by a judgment at law against the administrator, unless the heir can show collusion.' Still more explicitly, and in elucidation of the law established in this state for the settlement of claims against deceased debtors out of their estate, Henderson, C. J., thus speaks in Sanders v. Sanders, id. 262, decided at the ensuing term: 'The conclusive effect of that suit,' referring to a previous decree, 'arises from the *peculiar relation subsisting in our law* (the italics are his) between the personal representative and the heir. I call it peculiar, for I believe it nowhere else exists. *Here they are not strangers*, as they are in England, but there is

not be disturbed in the absence of fraud, mistake or other grounds for equitable relief, though made in absence of those interested, after the expiration of three months from the time of the allowance.[1] Therefore, where the statute only requires

a *quasi privity* between them, as the former defends as well *for* the heir as for the other creditors, the legatees and next of kin. The judgment against him, in the absence of fraud, is conclusive upon all, except as to the plea of fully administered. The law allows the heir to contest that, when brought in to show cause, not why the creditor should (not omitted) recover his debt, but why he shall not have his judgment, obtained against the executor or administrator, levied out of the real estate.' The practice then prevailing, when the devisee or heir was brought in to show cause why the land should not be sold and the proceeds applied to the judgment, differs in no respect, so far as the principle is concerned, from that introduced in the act of 1846, which requires the representative himself to pursue the real estate, and to cause so much of it to be converted into assets by a sale as may be needed, and to be put into his hands and used in a due course of administration in like manner as the personal assets. The same defenses, and none others, are open to the heir and devisees, whichever course may be pursued, and the judgment equally concludes that arising out of the lapse of time. If the suit were upon the original debt by specialty, it not being merged in the judgment, no statutory bar would be in the way, as there was no limitation upon such causes of action under the law then existing, but only a presumption raised from the lapse of time, liable to be rebutted by proper proof, that the debt still subsisted under the former method of proceeding by *scire facias*. So where the personal representative, against whom the indebtedness is established by final judgment, pursues the real estate, the heir and devisee are for similar reasons concluded from setting up a defense under the statute of limitations. Again, under the act of 1775, if the judgments were out of the way and the representative was sued, he could not avail himself of its protection, because he had not fully administered and discharged himself of the trust. The present plaintiff, it is found as a fact, has made $1,700 out of funds of the estate delivered over to him by the removed executor; and this would have defeated the plea, when interposed, according to the ruling in Cooper v. Cherry, 8 Jones (N. C.), 323–330, recognized since in McKeithan v. McGill, 83 N. C. 517; Rogers v. Grant, 88 N. C. 440; Morris v. Syme, id. 453. Again, the personal estate must be exhausted or its deficiency ascertained, before the land can be charged; and this condition includes the recovery of wasted assets upon the bond or against the representative, as we have shown in Lee v. Beaman, 101 N. C. 294. And this necessity arises out of the relations of the two classes and kinds of property towards the creditors, which require the application of the one to the indebtedness first, and charges the other only so far as is required to make up a deficiency; and to enable the heir and devisee to disprove the averment of such sufficiency they are severally brought into court." But see Irwin v. Scriber, 18 Cal. 498.

[1] See note 1 p. 408, also notes to § 143; Patterson v. Bell, 25 Iowa,

that notice be served on the administrator, the allowance of the claim stands in the nature of a judgment of law in that respect. A probate court may allow equitable claims against an estate or any moneyed demand, the subject of an action, unless the jurisdiction is restricted by statute.[1] Where it is necessary to sell real estate to pay debts, the administrator may relieve the estate of a cloud on its title by a proceeding in equity, under the direction of the court; but only where it is necessary to sell the estate to pay the debts against it, and that necessity must appear from the petition, showing a full schedule of the claims due from the estate. In such proceedings the heirs must be made parties.[2] The administrator may collect rent maturing during the life of the decedent under an express covenant, but rent earned or maturing after the death of the deceased goes to the heirs of the estate.[3]

§ 146. Incidental matters, jurisdiction over.—In many particulars probate courts have concurrent jurisdiction with the common-law and equity courts.[4] When the jurisdiction

150. Estate of Berryhill, 61 Iowa, 849: "While it does not certainly appear on the face of the petition that the guardian has made her final report and been discharged, such fact we understand to be conceded by counsel for the appellant, and the arguments have been made on that basis. This being so, the proper time to object to the report was before it was confirmed by the court and the charges therein made and allowed against the estate. Possibly the guardian's report may, after the confirmation, be attacked and set aside, or the confirmation modified in a direct proceeding; but no such relief is asked. So far as the guardian, then, is concerned, the confirmation of the report must be regarded as an adjudication binding on the parties. Patterson v. Bell, 25 Iowa, 149; Cowins v. Tool, 36 id. 82; Kows v. Mowery, 57 id. 20."

[1] Estate of Crosby, 55 Cal. 574.

[2] Gladson v. Whitney, 9 Iowa, 267.

[3] Foteaux v. Lepage, 6 Iowa, 123; Lepage v. McNamara, 5 Iowa, 124; Laverty v. Woodward, 16 Iowa, 5; Peall v. St. Clair's Heirs, 6 Ohio, 535; Wilson v. Wilson, 13 Barb. 252; Gladson v. Whitney, 9 Iowa, 268; Beezley v. Burgett, 15 Iowa, 192; Foltz v. Prouse, 17 Ill. 487; Wright v. Williams, 5 Cow. 502; Prewitt v. Durham, 5 Monr. 18.

[4] Tryon v. Farnsworth, 30 Wis. 577. Gary's Probate Law, sec. 688: "This power and jurisdiction, however, is limited to matters pertaining strictly to the settlement and determination of the rights and interests of the parties in the property of which the court has jurisdiction. The judge of probate is not a chancellor. He possesses chancery powers, but they are only such as are incidental, connected with the settlement of a particular estate and necessary for the adjustment of equitable rights, and not to find and enforce equities in the ordinary and loose sense in which

of the former depends upon a fact that it is required to find preliminarily, then the exercise of jurisdiction implies the previous finding of such fact at the proper time; and the finding cannot be attacked in a collateral proceeding.[1] And where

that term has come to be used in the law. If there are trusts connected with the property, or liens upon it, or priorities enforcible in equity, if through fraud, accident or mistake a class of creditors or beneficiaries is entitled of right to relief as against other creditors or beneficiaries, he may marshal or distribute the assets so as to enforce or satisfy the right. But it must be a right — one which a court of equity would take cognizance of and enforce if application could be made to such court. Butler, C. J., in Vail's Appeal, 37 Conn. 185, 195. In this and other Connecticut cases it is held that the probate court may enforce equitable priorities of liens among creditors on the distribution of insolvent estates. See Ashmead's Appeal, 27 Conn. 241; Waterman's Appeal, 26 Conn. 96. An order of distribution is conclusive until set aside on appeal. Kellogg v. Johnson, 38 Conn. 269."

[1] Howe v. McGivern, 25 Wis. 529: "We agree with the respondent's counsel that the question whether the premises were the homestead was a jurisdictional one, and one which, upon the record of the probate court here presented, can be raised collaterally to show that the administrator's sale was void. The general question of the right of every party against whom an alleged judgment or judicial proceeding is introduced, to inquire collaterally into the question of jurisdiction, whether arising upon the service of process or in relation to the subject-matter, has been very fully considered by this court in the cases referred to by the counsel, and such right has been uniformly sustained. But in the case of Wanzer v. Howland, 10 Wis. 8, we attempted to state the distinction between an entire absence of jurisdiction,— a lack of authority in the tribunal to take cognizance at all of the subject it had decided, — and those cases where the court is authorized to enter a certain judgment or order upon a particular state of facts; and, as preliminary to such action, to inquire whether the particular facts exist or not. And we held that in the latter cases, the existence of such facts, although the essential foundation of the right of the court to proceed further, yet was not jurisdictional, in that sense which would authorize a party, against whom they had once been so put in issue, tried and determined, to raise them again collaterally with a view to defeat the judgment or order against him, by showing that they did not exist in fact, and thus that there was no jurisdiction. . . . I am strongly of the opinion, that, inasmuch as the probate and county courts have jurisdiction to hear and determine all applications by administrators for license to sell the real estate of their decedents which is liable to sale, this necessarily involves the power of determining whether in any particular case the real estate sought to be so sold is so liable or not. Such a power must exist somewhere, and wherever it does exist, when the fact is once properly alleged and decided, I do not readily see any reason why the determination would not have the same effect that ordinarily belongs to decisions, by judicial tribunals, of questions which they are authorized

the fact so found is one that in its nature is binding on the world; strangers to the record are affected by such finding. This rule has been applied to a finding that the deceased was a resident of a certain county at the time of his death.[1] But such rule would not apply where the matter found would go to the jurisdiction of the court as an entirety, such as a finding of the death of the decedent on whose estate the court sought to administer, or any fact that would destroy the jurisdiction of the subject-matter as a whole.[2]

Where a minor has property in a state in which he is not a resident, the court may exercise jurisdiction over it and appoint a guardian of the estate, prescribe the manner in which such guardian shall perform his duties in regard to the care, management and disposition of the estate, and how it may be disposed of and its proceeds invested.[3] The general rule is that

to decide. And if in this case it had been alleged, before the probate court which authorized the sale, that the land was not the homestead of the decedent, and the court had so found, or if, being the homestead, it had been alleged that there were valid debts contracted prior to the act of 1850, for which it was necessary to sell it, and the court had so found, it would be difficult for me to take the case out of my own reasoning in Wanzer v. Howland or to distinguish it from Brittain v. Kinniard, 1 Brod. & Bing. 432, which I there cited with approbation. But we all agree that whatever effect might be given to an order of license made by the probate court in this case, if the facts above indicated, involving the liability of the land to sale, had been alleged and determined, still, where this does not appear, the fact remains open as a jurisdictional one. In such case, it does not appear that the court had exercised the power of determining whether the land was a homestead or not, and had proceeded to make its order only after deciding that it was not. The record is entirely consistent with the theory that it assumed the power to license the sale of an acknowledged homestead. Such an assumption of power would be clearly void for want of jurisdiction. This would be conceded if the fact appeared on the face of the record. But even where it does not so appear, but the record is still consistent with that theory, where it does not show that the court exercised the power which it may have possessed of deciding upon the fact, and the exercise of which might have concluded the parties, its order must remain liable to be defeated by proof that the subject-matter which it assumed to dispose of was not within its jurisdiction." Woods v. Monroe, 17 Mich. 238; Bailey v. Scott, 13 Wis. 618.

[1] Johnson v. Beazley, 65 Mo. 250; Fisher v. Bessett, 9 Leigh, 119; Obert v. Hammel, 18 N. J. L. 75; Hahn v. Kelly, 34 Cal. 391.

[2] See Griffith v. Frazier, 8 Cranch, 9, and *ante*, § 124.

[3] Hoyt v. Sprague, 103 U. S. 631: "As the question before us is one of power and not of comity, we think

where any matter comes before a probate court, after it has acquired jurisdiction to settle the estate, it may pass on such matter, as in determining the validity of bequests, where the power does not extend to trusts created by will; for it must determine whether there is a valid bequest, or whether it has lapsed.[1] In short, a probate court may fully settle an estate and pass upon all questions incidental thereto so long as the rights of parties who are not heirs or creditors of the estate are not affected; or where the affairs of a partnership or a corporation are not to be wound up. In the last cases the aid of a court of equity is essential. It may settle disputes between the executor and heirs in relation to assets, may surcharge the accounts of the administrator or executor, correct the invoices made, and do all things incident to the closing of the estate.[2] The court may also open final settlements for fraud or mistake, when application is made in proper form and time and on sufficient grounds.[3]

The reader must, however, bear in mind, after consulting the statute, to ascertain whether the matter is within the general powers bestowed in the settlement of the estate. He should also consider the distinction that always arises between a want of jurisdiction of the subject-matter and where juris-

there can be no doubt that the legislature of Rhode Island, where the property was situated, had power, first, to pass laws for the appointment of guardians of the property of non-resident infants, situate in that state, and secondly, it had power to prescribe the manner in which such guardians shall perform their duties as regards the care, management, investment and disposal of such property; and that this power is as full and complete as where the minors are domiciled in the state."

[1] Brook v. Chappell, 34 Wis. 411: "It may grant equitable relief or enforce a trust in a case of this nature, the same as a court of equity; and although the jurisdiction of the court of equity still exists, it does not oust that of the county court in a proper case. The doctrine of equitable estoppel may be recognized, and its principles enforced, as well by the county court as by the court of chancery, the jurisdiction of the latter being concurrent, merely, in any matter pertaining to the settlement of the estates of deceased persons. And it is immaterial, also, that the petitioners, or parties seeking redress in the probate court, may have their remedy by action in a court of law as well." Appeal of Schaeffner, 41 Wis. 260.

[2] Mix's Appeal, 35 Conn. 121; Longley v. Hall, 11 Pick. 120; Sherman v. Chace, 9 R. I. 166; Field v. Hitchcock, 14 Pick. 405.

[3] Adams v. Adams, 21 Vt. 162; Stearns v. Brown, 1 Pick. 530.

diction existed but was improperly exercised. To give jurisdiction there must be an estate, the owner of the estate must be deceased, the estate must be within the jurisdiction of the court whose power is invoked, and the court must have the necessary facts before it in the proper manner. Want of jurisdiction as to either of these essential matters defeats the power, unless the question becomes one of fact as to which of two courts had jurisdiction, and such question has been adjudicated as before stated.[1]

[1] See notes 2 and 3, § 135.

CHAPTER XIV.

JURISDICTION IN ATTACHMENT AND GARNISHMENT.

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§ 147. Attachment of property — Mode of seizure — Lien. The object of the writ of attachment is to secure the payment of the claim of the plaintiff against the defendant in the suit. To render the writ available there must be an actual or constructive seizure of the property so as to bring it under the jurisdiction of the court; such seizure is ordinarily made in the same manner as property on execution is taken. The property, by such seizure, is brought under the control of the court. If property is exempt from execution, or is not in the custody of the defendant, it cannot be seized by attachment; the writ only reaches the right of the defendant in the property at the time it is issued and seized thereunder.[1] The attachment is a lien on the property seized to the extent of the defendant's interest therein at the time of seizure.[2] This lien is valid while the attachment is pending, but if the plaint-

[1] Exempt property not subject to attachment. Naumburg v. Hyatt, 24 Fed. Rep. 898; George v. Fellows, 60 N. H. 398; Richards v. Hubbard, 59 N. H. 158; Emerson v. Bacon, 58 Mich. 526; Hastings v. Phœnix, 59 Iowa, 394. Mortgaged personal property, when the mortgagee is entitled to the possession, not attachable, although mortgagor is in possession. Jennings v. McIlroy, 42 Ark. 236; Courtney v. Carr, 6 Iowa, 238; Smith v. People's Bank, 24 Me. 185; Thornton v. Wood, 42 Me. 282; Campbell v. Leonard, 11 Iowa, 489; Gordon v. Hardin, 33 Iowa, 550; Vanslyck v. Mills, 34 Iowa, 375; Wells v. Sabelowitz, 68 Iowa, 238; Porter v. Knight, 63 Iowa, 365; Goodnow v. Wells, 54 Iowa, 326. Property liable to seizure and sale on execution may be attached. Smith v. Orser, 42 N. Y. 132; Myers v. Mott, 29 Cal. 359. Spirituous liquors illegally kept for sale may be attached. Tucker v. Adams, 63 N. H. 361. But see, *contra*, Nichols v. Valentine, 86 Me. 322. Grass in field, not cut, not an emblement, and cannot be attached. Rogers v. Elliott, 59 N. H. 201. The title must be fully vested in defendant before the property is subject to attachment. Buckmaster v. Smith, 22 Vt. 203. Goods in hands of carrier cannot be attached while right of stoppage *in transitu* exists. O'Brien v. Norris, 16 Md. 122; Wolf v. Crawford, 54 Miss. 514. So property in hands of consignee. Holly v. Huggeford, 8 Pick. 73.

[2] Manny v. Adams, 32 Iowa, 165; Harshberger v. Harshberger, 26 Iowa, 503; Bacon v. Thompson, 60 Iowa, 284; Rogers v. Highland, 69 Iowa, 504. The lien does not take precedence over unrecorded conveyances. First Nat. Bank v. Hayzlett, 40 Iowa, 659; Savery v. Browning, 18 Iowa, 246. Where an intervenor sought to defeat an attachment lien, under claim that he was the owner of the attached property, held, that a decree in an action between him and attachment defendant, to which attaching plaintiff was not a party, was not admissible. McBride v. Harn, 48 Iowa, 151. The lien is a vested right which nothing subsequent to the attachment can destroy, except dissolution of the attachment. Hannahs v. Felt, 15 Iowa, 141.

iff does not obtain judgment against the defendant on the trial the lien is vacated.[1] The attachment takes precedence over prior judgments, where they are not a lien either by operation of law or prior levy, and the attaching creditor is in point of time entitled to priority from the service of the writ of attachment.[2]

§ 148. Attachment and garnishment or trustee process, generally.— In the chapter on "Proceedings *Quasi in Rem*," we referred to the matter of attachment as a proceeding *in rem* in some respects, where, by this process, the property and effects of non-residents are attached. It is not necessary to repeat what was there said concerning this proceeding, or to refer to the effect of the judgment against the thing where no process is served on the defendant within the jurisdiction.

An attachment proceeding in most of the states is begun by filing in a court a verified application showing some statutory ground why the writ should issue. The proceeding is usually resorted to for the purpose of aiding the plaintiff in collecting a claim or enforcing a cause of action. If the application complies with the statute the writ issues and the defendant's property is levied on in advance of the judgment of, or even the hearing by, the court of the merits of the cause of action involved in the litigation between the parties. In such case it is an auxiliary writ or process of the court in aid of the collection of the debt, issued for cause shown that the defendant has done or is about to do some act that will prevent or impede the collection of the debt on final process. There is, however, another class of attachments in civil actions, jurisdictional in their character, known as foreign attachments. The showing made to the court usually is, in such cases, that process cannot be served on the defendant in the state, or within the jurisdiction of the court, and that the defendant has property within the jurisdiction that is subject to seizure to satisfy the debt sued on. In such cases the action is against the thing; and the proceeding may or may not be a proceeding *in rem*. If the defendant appears to the action after warn-

[1] Talbot v. Harding, 10 Mo. 350; Field v. Milburn, 9 Mo. 492; Manny v. Adams, 32 Iowa, 165; O'Connor v. Blake, 29 Cal. 312; Greenleaf v. Mumford, 30 How. Pr. 30.

[2] Drake on Attachment, sec. 229, and cases cited.

ing or notice, the proceeding is a personal action; if no appearance is made, and no personal service of process is obtained within the jurisdiction, then the remedy is confined to the property attached. The proceeding then is not one strictly *in rem*, for the action is for the debt and not to obtain the thing.[1] The writ issues either at the commencement of the action or at any time afterward before final judgment. The grounds upon which it may issue are purely statutory.

The jurisdiction of the court is derived from the statute, and the application for the writ must follow the statute. The writ only issues on cause shown by affidavit, either at the time of the commencement of the action or during its pendency, stating some statutory ground why it should issue, showing that something, usually above $5, is due the plaintiff, and is sued for in the action. Originally, the debt that gave juridical cause for the attachment was one founded on contract; but under the later practice, or rather laws of the states, the writ is obtainable in many of them where the action is founded on tort. The attachment being obtained to secure payment of the debt or to get jurisdiction, good reasons exist why the writ should issue in any action for the collection of money.[2] In some states the writ issues in equity, but the statute must be substantially followed in all cases, or the writ will be quashed.[3]

Inasmuch as the writ issues on the application of the plaintiff, the statute usually requires an attachment bond to be filed for the protection of the defendant with sureties duly approved, indemnifying him against such damages as he may

[1] See ch. 7, §§ 55, 56.

[2] Groce v. Rittenberry, 14 Ga. 232; Parker v. Scott, 64 N. C. 118; Courrier v. Cleghorn, 3 G. Greene (Iowa), 523; Bowen v. Slocum, 17 Wis. 181; Manley v. Headley, 10 Kan. 88; Garner v. White, 23 O. St. 192.

[3] Wright v. Smith, 66 Ala. 545; Johnston v. Hanna, 66 Ala. 127; Shockley v. Bulloch, 18 Ga. 283; Gresham v. DeLaunay, 34 Ga. 442; Courrier v. Cleghorn, 3 G. Greene (Iowa), 523; Eads v. Pitkin, 3 G. Greene (Iowa), 77; Clark v. Roberts, 1 Ill. 285; Manley v. Headley, 10 Kan. 88; Kerr v. Smith, 5 B. Mon. 552; Beach v. Botsford, 1 Doug. 199; Erwin v. Commercial Bank, 3 La. Ann. 186; Black v. Brisbin, 3 Minn. 360; Watkins v. Wallace, 19 Mich. 57, 74; Hargadine v. Van Horn, 72 Mo. 370; Williams v. Glasgow, 1 Nev. 533; Greenway v. Mead, 26 N. J. L. 303; Cadwell v. Colgate, 7 Barb. 254; Bates v. Relyea, 23 Wend. 336; In re Faulkner, 4 Hill, 598; Foster v. Jones, 1 McCord, 116; Devries v. Summit, 86 N. C. 126; McReynolds v. Neal, 8 Humph. 12.

sustain by reason of the wrongful issuing of the writ. The rule is not as strict now as formerly in regard to the quashing of attachments; and where there is cause for the issuing of the writ in fact, the court will not suppress or quash it if by amendment of the affidavit facts can be set forth supporting it, as the writ is a highly remedial one.[1] The jurisdiction depends largely on the statute of the state pertaining to the issuing of the writ; also, the right to amend the pleading or affidavit, so that few jurisdictional matters arise which may not be settled by a careful reading of the statute. It may be said that the proceeding by attachment is in the United States a purely statutory remedy, and the rulings of the courts have been in favor of a strict construction of the law; but such rule is daily being modified, where an amendment can be made so as not to prejudice the defendant, and the error is one relating to form; but where there is a material omission in the form of an affidavit, such rules will be applied as ordinarily govern in statutory actions, and the attachment will be dissolved.[2]

§ 149. Attachment proceedings by garnishment.— The most important jurisdictional questions connected with attachments, save and except those against foreign or non-resident debtors, already discussed in the chapter on proceedings *quasi in rem*, arise in garnishment actions. The word "garnish" means to warn, to make aware of, to notify; but garnishment, as an American law term, means the process of warning or rather citation of a person who owes money to the defendant in an attachment suit not to pay to the defendant any indebtedness he may owe to him, but to retain it and all property

[1] Cook v. Jenkins, 30 Iowa, 452; McCarn v. Rivers, 7 Iowa, 404; Bundy v. McKee, 29 Iowa, 253; Gourley v. Carmody, 23 Iowa, 212. Defective affidavits may be cured by amendment. Shaffer v. Sundwall, 33 Iowa, 579; Lowenstein v. Monroe, 52 Iowa, 231; Stout v. Folger, 34 Iowa, 71. *Contra*, Slaughter v. Bevans, 1 Pin. (Wis.) 348. Where amendment was made after an appeal from decision on motion to quash and the cause reversed on appeal, held, the court could permit the amendment curing defect. Stadler v. Parmlee, 14 Iowa, 175. A defect in the bond may be cured by filing a new one. Elliott v. Stevens, 10 Iowa, 418. But see People v. Blanchard, 61 Mich. 478; Tanner v. Hall, 22 Fla. 391; Randle v. Mellen, 67 Md. 181; Winters v. Pearson, 72 Cal. 553; Myers v. Whiteheart, 24 S. C. 196; Kellogg v. Kimball, 142 Mass. 124. *Contra*, Muser v. Lissner, 67 How. Pr. 509; Henderson v. Stetter, 31 Kan. 56; Claflin v. Hover, 20 Mo. App. 314.

[2] Wade on Attachment, sec. 3.

he holds belonging to such defendant, all money due him, and all choses in action subject to attachment, and to deliver such money, property or rights into the custody of the court, and appear and answer on oath touching his indebtedness to the attaching defendant, and obey the order of the court in respect thereto. It will be perceived at once that garnishment is in the nature of an equitable attachment of money, property or an indebtedness in the hands of a third person belonging to the attachment defendant, which could be subjected to the payment of the debt if found in the hands or possession of the defendant himself.

In the first place, the court must have jurisdiction over the attachment defendant, and secondly, the garnishee must be duly warned of the proceedings.[1] There must be a debt due from

[1] Welsh v. Blackwell, 14 N. J. L. 348: "Now why the sheriff was commanded to summon Jefferson Blackwell to show cause, rather than the crier of this court, or any other person, does not appear on the *scire facias*. A plaintiff in attachment cannot make any man a garnishee by merely issuing a *scire facias* against him, and calling upon him to show cause. A garnishee is a person in whose hands money or goods have been attached, and he is so called because he has had 'garnishment,' that is warning, not to pay the money to the defendant in attachment. 3 Jac. L. Dic. 175. And this is what our attachment act requires. The fourth section, Rev. Laws, 356, directs the sheriff to go to the house or lands of the defendant or to the person or house of the person in whose custody or possession the defendant's property or estate may be, and then and there declare, in the presence of one credible witness at least, that he attaches, etc. The sheriff must return not only what he has attached, but in whose hands he attached it. McDaniel v. Hughes, 3 East, 367. It ought, therefore, to appear on the *scire facias* in whose hands the property was attached, and what that property consisted of. This is necessary for the protection of the garnishee, in case of a suit against him by the defendant in attachment. The case of Neal v. Cook, in 5 Halst. 337, is directly in point, and must govern this case. In the case above cited from 3 East, 367, the return stated that fifteen hundred pounds, in moneys numbered, were attached in the hands of the garnishee. If the defendant should plead as the statute requires to this *scire facias* he would do so blindfolded; and the record would afford him no protection in a suit against him by the defendant." Pennsylvania R. R. Co. v. Pennock, 51 Pa. St. 253; McDonald v. Moore, 65 Iowa, 171; Bethel v. Judge of Superior Court, 57 Mich. 381, holding garnishment to be in the nature of an equitable attachment of the debt or assets of the principal defendant in the hands of a third person. Its object is to reach such assets and apply them in discharge of the principal debt. Padden v. Moore, 58 Iowa, 708. See 22 Albany Law Journal, 181; Buchanan County Bank v.

the garnishee to the defendant in the judgment, payable at the time of the service of the writ or to become payable. The debt must be, at least, a cause of action.[1] (In this chapter we make no

Cedar R., I. F. & N. W. R. R. Co., 62 Iowa, 494; Williams v. Williams, 61 Iowa, 612; Wise v. Rothschild, 67 Iowa, 84; Kennedy v. Brent, 6 Cranch, 187; Tillinghast v. Johnson, 5 Ala. 514; Thompson v. Allen, 4 Stew. & P. 184; Watkins v. Field, 6 Ark. 391; Martin v. Foreman, 18 Ark. 249; Parker v. Kinsman, 8 Mass. 486; Burlingame v. Bell, 16 Mass. 318; Bryan v. Lashley, 13 S. & M. 284; Blaisdell v. Ladd, 14 N. H. 129.

[1] Lane's Appeal, 105 Pa. St. 65: "In order to sustain an attachment in execution there must be a debt due from the garnishee to the defendant in the judgment, which may be payable at the time of the service of the writ, or may become payable subsequently. This debt must be at least a cause of action. If it be not, so that it cannot be enforced by the defendant against the garnishee, it certainly cannot be converted into a cause of action by the mere consideration that an attachment has issued instead of a summons in a common-law action. If there is an inherent defect in the cause of action itself which prevents any recovery by the defendant or his representative because of the nature of the defect, it is not possible that such defect can be regarded as removed simply because another proceeding is adopted. Now, it is manifest, upon the plainest principles, that in the case of an insolvent corporation, all of whose assets are exhausted except its unpaid capital stock, there can be no recovery against a delinquent stockholder until a call or assessment has been made upon him fixing the amount he is required to pay. Prior to insolvency this might be done by the corporation if it is not disabled by the special terms of the subscription contract. But when insolvency and exhaustion of assets exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceeding originates in the name of one, or of several, or of all the creditors, the result is the same in each. The capital, when recovered, inures to the benefit of all, and must be distributed among all ratably. Before any recovery can be had in such proceedings, no matter of what particular form, there must be an assessment made by a competent authority. The necessity for an assessment arises from the consideration that only so much of the unpaid capital can be called in as is required for the payment of the unsatisfied debts. If the whole unpaid capital is not required, the whole cannot be called. In order to ascertain how much is required, there must be an account of debts, assets and unpaid capital taken, and then a decree for an assessment of the amount due by each stockholder. Thus in Mann v. Pentz, 3 Comst., on p. 423, the court said: 'This liability (for unpaid capital) is only incurred when the capital paid in is not sufficient to satisfy the debts against the corporation, and then only to an amount sufficient to satisfy such debts. It is therefore necessary that an account of the assets and of the debts should be taken, of the amount of capital remaining un-

distinction between garnishment under process by attachment and garnishment under execution, for none exists in law.) In order to constitute a debt, such a cause of action must exist in the defendant as would give him the right to himself sue

paid upon the shares and the amount unpaid by each stockholder, in order that they may be made equally liable.' In Myers v. Seeley, 10 Nat. Bank. Reg. 411, the court, after stating the rule, say: 'The reason of that rule is, that the unpaid subscriptions are assets applicable to the payment of corporate debts which the corporate authorities may call in for corporate purposes. If there are adequate assets other than said calls, then the creditor has no legal or equitable right to insist upon such calls. Primarily, the amount due on subscriptions is a debt due to the corporation which it alone can enforce, and unless the corporation is without other assets to meet its obligations and fails to make the needed calls, creditors cannot interpose. When the facts justify their interposition, an account of assets and debts should be taken, in order that it may be known what, if any, calls should be made. No further call should be made than what is sufficient, together with the other assets, to meet all debts, for the bill by creditors cannot reach beyond the satisfaction of their demands. They have no other equity.' In Wilbur v. Stockholders, 39 Leg. Int. 346, Cadwaladar, J., said: 'Where the corporation is solvent, the unpaid capital is not due and payable by the stockholders until payment in part or in whole is called for by the corporate authorities, unless a postponement of the payment would be inconsistent with some provision of the act of incorporation, or with a conventional engagement with the stockholders. Ordinarily there is no such inconsistency of either kind, and thus, in the case of a solvent corporation, a call or levy by the corporate authorities assessing the amount or amounts payable must ordinarily precede any ascertained obligation of the respective stockholders to pay. But in the contrary case of an insolvent corporation the recourse of its creditors does not depend upon such condition precedent, and cannot be thus postponed. Every stockholder is, with relation to creditors, under an obligation to pay so much of the amount represented by his share or shares of the capital as may be required for the payment of the corporate debt. . . . Upon the insolvency of the corporation the obligations of the stockholders thus at once become assets for the payment of its debts to such an extent as other assets are deficient. To this extent the obligation of every stockholder, in its just proportion, then becomes in equity a debt payable for the benefit of the creditors. No act of the corporation before or after its insolvency can derogate in this respect from the rights of creditors.' In Webster v. Upton, 1 Otto, 71, Strong, J., says: 'All the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary, for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent.'"

upon it in a court of law, either at the time the garnishment proceedings were begun or then in process of maturing, without other act on the part of the defendant. Hence a proceeding in garnishment will not lie in favor of a judgment creditor against the stockholders of an insolvent corporation where there has been no assessment of the capital stock by the corporation, because the corporation could not collect until the assessment was made, and a proceeding in equity for the benefit of all the creditors is necessary.[1] It is a familiar rule of

[1] Lane's Appeal, *supra:* "I consider it as the clear result of the decisions that, except in cases where the corporate authorities have themselves made calls which are authorized by the subscription contracts, there is absolutely no liability of any kind whatever on the part of the stockholder to pay any part of his unpaid capital, except under and by force of an assessment made as above stated. If this be true there is nothing upon which an attachment can fasten at any time prior to the assessment. I apprehend this conclusion is sustained by specific authority which I now proceed to indicate. The case of Chandler, Receiver, v. Siddle, a Stockholder, 10 Nat. Bank. Reg. 236, was an action at law by a receiver of an insolvent insurance company against a single stockholder, to collect eighty per cent., unpaid, of the defendant's subscription to the capital stock of the company. The subscription contract provided for the payment in instalments of twenty per cent. of the stock, and that the balance should be subject to the call of the directors as they may be instructed by majority of the stockholders represented at any regular meeting. There was no call by the directors, and the receiver brought an action at law on the contract to recover the eighty per cent. against one stockholder defendant. The circuit court of the United States for the southern district of Illinois, Miller, J., in disposing of the case, said, on page 238: 'In this action at law, in which neither the corporation or its stockholders other than the defendant are before the court, and in which the suit is on the contract of subscription for the entire eighty per cent. alleged to be due, I am of opinion, considering the terms of that contract, and that no call or assessment is alleged either by the company before the insolvency or by the court since, that the petition does not state a cause of action. In other words, in this action at law on the contract there must be a call or assessment, or something standing in the place thereof and equivalent thereto, either by the company or by a proper court, in order to make the defendant liable.' If there was not a cause of action, nothing to make the defendant liable without an assessment, surely there could be nothing to serve as the foundation of an attachment. For the writ of attachment cannot create a liability. It can at best appropriate a liability already existing. But if it already existed it could be enforced in the proceeding on the contract. The attachment is also on the contract alone where there has been no assessment, and must fall with the action at law built upon the same foundation. The case of Adler et al. v. The Milwaukee Patent Brick Mfg. Co. et al.

the law of attachment that the attaching creditor stands in the shoes of the defendant and can assert no greater rights than the defendant can or could assert were he suing the garnishee. Garnishment is a process to bring the garnishee before the

18 Wis. 63, was a proceeding by one creditor suing for himself and all other creditors, etc., against the corporation and a number of stockholders to compel the payment of unpaid capital stock in discharge of debts. The general principles we have heretofore stated were announced; and on page 70, Dixon, C. J., speaking of the question whether one creditor might acquire a preference over others, said: 'Whether in those cases where the stockholders are not individually liable by law for the debts of the corporation, one creditor can, by superior diligence, acquire a preference over the other creditors beyond that which might result from his judgment becoming a lien on specific property or his having otherwise obtained a higher security at law, does not distinctly appear. But the conclusion from the cases, and the general doctrines of courts of equity, is, I think, that he cannot; and that when he is obliged to seek the aid of those courts for the enforcement of his demand he must do so for the benefit of all other creditors who may desire to unite with him, and that all must share alike in proportion to the amount of their respective claims in the funds which may be realized by the proceeding. The maxim of the law in like cases is that equality is equity; and certainly no case more appropriate for its application could be imagined. I conclude, therefore, and the authorities clearly tend to show, that such is the practice.' In the case of Wilbur, Assignee, v. Wilson et al., in the circuit court of the United States for the eastern district of Pennsylvania, 21 Oct. Sess. 1875, not reported, common-law actions were brought against the stockholders by the assignee in bankruptcy upon promissory notes given by each stockholder for the payment at a definite time of the full amount of each subscription. There was a condition annexed that only fifty per cent. of the amount of each note was subject to assessment, and that the remainder should be paid only in dividends of profits earned. Affidavits of claim were filed by the plaintiff setting out the notes and conditions in full, but alleging that the conditions were void because the corporation had become insolvent and bankrupt; that its assets were all exhausted; that eighty per cent. of the capital had never been paid, and that the whole of it was required for the payment of the debts. Defense was taken by affidavits which admitted the foregoing facts, but alleged that no assessment had ever been made upon the notes except one of thirty per cent., which was shortly after rescinded, and therefore there was no liability to pay any part of the eighty per cent. The justices of the circuit court, McKennan and Cadwalader, adopted this view and refused judgment for the plaintiff upon the exclusive ground that no assessment having been made, there was no liability of the stockholders to pay any sum whatever, and hence there was no cause of action. The writer was of counsel for the assignee in that case, and has personal knowledge that the decision was made upon the one ground stated, and no other. No written opinion was filed. A petition for an assessment was then presented

court, and not a pleading. It in no respect differs from levying on the property by attachment or execution, except that the plaintiff does not acquire a lien on the property in possession of the garnishee, but the right to require the gar-

in the district court, and the assessment was subsequently made. Although the plaintiff in the actions at law was the assignee who represented all the creditors, and who sought recovery for all, and all the stockholders were sued, and although the condition annexed to the notes was void against creditors, as was subsequently held, still it was decided that the absence of an assessment was fatal to the cause of action. We are very clear that if there was no liability at all sufficient to support an action there was none upon which to found an attachment. The case of Scovill v. Thayer, 15 Otto, 143, puts the whole subject at rest. There a corporation was adjudicated a bankrupt. The assignees presented a petition for an assessment upon the unpaid capital stock for payment of debts. The subscribers to the stock had made an agreement with the company that no more than twenty per cent. of the par of the stock should be paid. The petition of the assignees asked for an assessment of seventy-six per cent. for payment of debts. The defendant Thayer having failed to pay his assessment, the assignees brought an action at law against him upon the assessment, and to the declaration filed the defendant filed two pleas, the first of which was a general denial of the allegations in the narrative, and the second set up the limitation of two years prescribed by section 2 of the act of March 2, 1867, chapter 176, the general bankrupt law of the United States. The court below sustained the plea of the statute of limitations and gave judgment for the defendant. The assignees took a writ of error from the supreme court, and the whole case was there considered and the judgment of the lower court reversed. The question was, when did the cause of action arise? If it arose upon the subscription contract the bar of the statute applied, but if it did not arise until the assessment was made, then it did not apply, and the assignees were entitled to recover. On page 153 the court say: 'The precise question with which we have to deal is when would this action at law, brought by the assignees of the bankrupt company against a stockholder to recover a part of the balance due on his stock, be barred by the statute? This will depend on the answer to the question when did the cause of action accrue to the assignees? In other words, when could they have commenced this action against this defendant to recover the amount due on his stock? . . . The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter. . . . No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares

nishee to hold the property and refrain from paying or delivering it to the defendant, and makes the garnishee liable for the property he holds or its value.

were issued as full-paid on a fair understanding, and that bound the company. In fact it has been held in recent English cases that not only is the company but its creditors also are bound by such a contract. . . . But the doctrine of this court is that such a contract, though binding on the company, is a fraud in law on its creditors which they can set aside; that when their rights intervene, and their claims are to be satisfied, the stockholders can be required to pay their stock in full. . . . The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. . . . The question for solution is, therefore, when, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it becomes his duty to pay according to the terms of his contract or according to law. It is well settled that when the stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call if the interests of the creditors require it. The court will do what it is the duty of the company to do. . . . But under such circumstances, before there is any obligation upon the stockholder to pay, without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand. . . . In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient with the other assets of the company to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete. But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder, to the effect that the latter should not be required to make any further payment upon his stock, should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceeding for an assessment in the bankruptcy court was, in effect, a proceeding to accomplish two purposes: first, to set aside the contract between the company and the stockholder, and second, to fix the amount which he should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock.' In Patterson v. Lynde, 16 Otto, 519, a judgment creditor of the

§ 150. Foreign attachments — Interstate garnishments. The jurisdiction of foreign attachments rests upon the seizure of the defendant's property situated within the state where the action is commenced. Without such seizure the jurisdiction fails. The *situs* of the debt is the domicile of the creditor. Jurisdiction over the non-resident debtor does not confer jurisdiction to proceed against the debt as the property of a non-resident debtor, unless the creditor or garnishee is within the jurisdiction. As between independent states or sovereignties, when one asserts such power the other must either recognize the right or compel the debtor to pay twice; and this would be inequitable. Hence, if the property of A. is seized in a foreign state under an attachment issued against the property of B. at the instance of the creditors of B., A. is not bound to appear in such foreign state and assert his title in the attachment suit, and the judgment in such suit would not transfer the title or affect the rights of A.[1] But when the states

corporation brought an action against one stockholder to enforce the payment of his unpaid capital stock in satisfaction of his judgment. It was held this could not be done. Waite, C. J., says, on page 520: 'Since this case was decided below the supreme court of Oregon has passed on the same question, and in Ladd v. Cartwright, 7 Oreg. 329, determined that the individual liability of stockholders for the indebtedness of the corporation is limited to the amount of their stock subscribed and unpaid, and that the remedy of the creditor to enforce this liability is in equity, where the rights of the corporation, the stockholder and all the creditors can be adjusted in one suit. Of the correctness of this decision we have no doubt. . . . No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself.'" Williams v. Young, 46 Iowa, 140.

[1] Williams v. Ingersoll, 89 N. Y. 523: "We must now consider the effect of the attachment proceeding in Connecticut. At the time the attachment was served none of the parties concerned, so far as appears, resided in that state but Lorin Ingersoll. All the other parties, the plaintiffs, James H. Ingersoll, Heath, Brady and Ivins, resided, as we must infer, in this state. The award was made in this state, and was at that time held in this state, and hence the debt in no sense had its *situs* in that state. A debt always, under general jurisprudence, has its *situs* either at the domicile of the creditor or where the written obligation upon which it is due is held, and not at the *situs* of the debtor. Hence, under general public law, recognized by all courts, there is nothing in Connecticut to attach. But local laws may fix the *situs* of the debt at the domicile of the debtor, and under such laws it may be effectually attached against a non-resident creditor, and compulsory payment under the attachment will protect the debtor everywhere against a suit for the recovery of the same

have a common arbiter, by whom the true limits of jurisdiction can be decided, such rule would not exist; hence the above rule would not apply to cases in the federal courts, where

debt by the creditor. The law seems to be thus settled for the reason that it would be unjust to compel the debtor to pay his debt twice. Embree v. Hanna, 5 Johns. 101. Here the Ingersolls have not paid the debt under the attachment; and when this suit was commenced the attachment had simply been served, and the attachment proceeding is still pending. But in Embree v. Hanna it was held that a pending attachment proceeding, under which a debt had been attached by service of the attachment upon the debtor in Maryland, could be pleaded in abatement to an action brought here by the creditors against the debtor for the recovery of the same debt, and the reason of the holding was that the debtor might be compelled to pay twice. The reason of that decision does not apply to this case. Here, before the Ingersolls had been compelled to pay, Lorin became a resident of this state, and all the parties, at the time of the commencement of this action, were residents of this state, and they are all parties to this action. Hence, there is no danger of a compulsory double payment. The judgment in this action can be used in Connecticut to defeat the attachment proceeding; that is, the court in that state, when it is brought to its attention, will undoubtedly respect it and give the garnishees the protection which it affords. And still further, if the Ingersolls desire it, they may now have, as part of the judgment in this equitable action, an injunction restraining the defendant Ivins from proceeding further in the foreign jurisdiction to enforce payment against them. They could probably, on the footing of the judgment in this action, apply at any future time for such an injunction, and, as Ivins is within the jurisdiction of the court, there can be no difficulty in making the injunction effectual for the perfect protection of the garnishees. Under such circumstances, it would be a very poor administration of justice which would turn the parties, all residents of this state, out of our courts and send them to a foreign jurisdiction to litigate the matters in controversy between them; and there are no authorities requiring that it should be done. But there is still a further reason for not applying in this case the rule laid down in Embree v. Hanna. At the time the attachment was served in Connecticut the debt did not belong to Heath, the attachment debtor. As I have shown, he had made an assignment of it effectual against him and against his attachment creditors. He had nothing, really or constructively, in that state to be attached, and as to these plaintiffs the attachment there was a mere nullity. It is believed that no case can be found which holds that when the property of A. is seized in a foreign state under an attachment issued against the property of B., at the instance of the creditors of B., A. is bound to appear in the foreign jurisdiction and assert his title to the property. Such an attachment proceeding would be ineffectual to transfer or change the title to the property. If the attachment at the suit of Ivins had been issued in this state this debt could not have been attached as the debt of Heath, provided notice of plaintiff's claim had been given to the Ingersolls at any time be-

the rights of all may be protected.[1] Still, substantially the same rule is held in such courts. Therefore, debts, rights and causes of action are treated by jurists as attached to the per-

fore payment by them under the attachment, or, perhaps, before their absolute liability to pay under the attachment had been fixed. In this state the seizure of the property of A., under an attachment issued against B., would be wholly ineffectual; and shall a foreign attachment have greater force than a domestic attachment? These views are, I think, fully sanctioned by the case of Osgood v. Maguire, 61 N. Y. 524."

[1] Green v. Van Buskirk, 5 Wall. 310: "The act of 1790 was intended to be an exercise of the power conferred upon congress by this section. In the leading case of Mills v. Duryee, 7 Cranch, 481, this court held that the act in question did declare the effect of such judicial records, and that it should be the same in other states as that in which the proceedings were had. In the case of Christmas v. Russell, 5 Wall. 290, decided at the present term of the court, we have reaffirmed this doctrine, and have further declared that no state can impair the effect thus to be given to judicial proceedings in her sister state, by a statute of limitations intended to operate on demands which may have passed into judgment by such proceedings, as though no such judgment had been rendered. The record before us contains the pleadings in the case, the facts found by the court, and the conclusions of law arising thereon, and notwithstanding the inverted manner in which the court has stated its legal conclusions, it seems clear that it did pass upon the effect of the judicial proceedings in Illinois upon the title of the property in contest. The case is not varied by declaring that the mortgage made and delivered in New York overreached the subsequent attachment in Illinois. According to the view taken by that court, Van Buskirk, the plaintiff, had title to the property under the laws of New York by virtue of his mortgage, and the question to be decided was whether the proceedings in Illinois were paramount in their effect upon the title to the New York mortgage. It is said that Van Buskirk being no party to the proceedings in Illinois was not bound by them, but was at liberty to assert his claim to the property in any forum that might be open to him, and, strictly speaking, this is true. He was not bound by way of estoppel as he would have been if he had appeared and submitted his claim and contested the proceedings in attachment. He has a right to set up any title to the property which is superior to that conferred by the attachment proceedings, and he has the further right to show that the property was not liable to the attachment — a right from which he would have been barred if he had been a party to that suit. And this question of the liability of the property in controversy to that attachment is the question which was raised by the suit in New York, and which was there decided. That court said that this question must be decided by the laws of the state of New York, because that was the domicile of the owner at the time the conflicting claims to the property originated. We are of opinion that the question is to be decided by the effect given by the laws of Illinois, where the property was situated, to the proceedings in the court of that

son of the creditor and governed by the law of his domicile. This distinction exists, however, between goods and choses in

state, under which it was sold. There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicile of the owner, will be held to be valid in the courts of the country where the property is situated, when these are in different sovereignties. The learned author of the Commentaries on the Conflict of Laws has discussed the subject with his usual exhaustive research. And it may be conceded that as a question of comity, the weight of his authority is in favor of the proposition that such transfers will generally be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. The courts of Vermont and Louisiana, which have given this question the fullest consideration, have, however, either decided adversely to this doctrine or essentially modified it. Taylor v. Boardman, 25 Vt. 589; Ward v. Morrison, id. 593; Emerson v. Partridge, 27 Vt. 8; Oliver v. Townes, 4 Martin (La.) (N. S.), 93; Norris v. Mumford, 4 Martin, 25. Such also seems to have been the view of the supreme court of Massachusetts. Lanfear v. Sumner, 17 Mass. 110. But, after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where the property is situated or the established policy of its laws prescribe to its courts a different rule. The learned commentator already referred to, in speaking of the law in Louisiana which gives paramount title to an attaching creditor over a transfer made in another state, which is the domicile of the owner of the property, says: 'No one can seriously doubt that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or a selfish policy.' Story on Conflict of Laws, sec. 390. Again, he says: 'Every nation, having a right to dispose of all the property actually situated within it, has (as has been often said) a right to protect itself and its citizens against the inequalities of foreign laws which are injurious to their interests.' Chancellor Kent (2 Comm. 599), in commenting on a kindred subject, namely, the law of contracts, remarks: 'But on this subject of conflicting laws it may be generally observed that there is a stubborn principle of jurisprudence that will often intervene and act with controlling efficacy. This principle is that where the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land.' In the case of Milne v. Moreton, 6 Binney, 361, the supreme court of Pennsylvania says that 'every country has a right of regulating the transfer of all personal property within its territory; but when no positive regulation exists, the owner transfers it at his pleasure.' The Louisiana court, in a leading case on this subject, gives in the following language a clear statement of the foundation of this principle: 'The municipal laws of a country have no force beyond its terri-

action: goods may have a local situation, but choses in action have not; and the rule applicable to movables, when locally

torial limits, and when another government permits these to be carried into effect within her jurisdiction she does so upon a principle of comity. In doing so care must be taken that no injury is inflicted on her own citizens, otherwise justice would be sacrificed to comity. . . . If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it.'" Green v. Van Buskirk, 7 Wall. 139. Crapo v. Kelly, 16 Wall. 621: "Omitting all superfluous circumstances the facts necessary to present the question on the merits are these: On the 23d of February, 1861, the insolvent court of Massachusetts appointed Crapo and others assignees in insolvency of Gibbs & Jenny, and the judge of that court executed and delivered to them an assignment of all the personal property of Gibbs & Jenny. At this date Gibbs & Jenny were the owners of the ship Arctic, an American vessel registered at the port of Fairhaven, in the district of New Bedford, in the state of Massachusetts, which vessel was then on the high seas, to wit, in the Pacific ocean. On the 30th day of the following April, this vessel arrived in the port of New York and was at once seized as the property of Gibbs & Jenny by an attachment issued at the suit of one Robinson, a creditor of Gibbs & Jenny, residing in New York. On the next day but one after the arrival of the vessel, Crapo came to New York and took possession of her subject to the possession of Kelly, the sheriff. Crapo represents the title under the Massachusetts assignment, which then, and at all times since, he has sought to enforce. Kelly claims under the New York attachment. . . . The present case is deficient in each of the elements necessary to bring the vessel within the range of the foregoing principles. She was not transferred by the personal act of the owner. She was not literally within the territory of Massachusetts when the insolvent assignment took effect, and, thirdly, she was not in the port of New York. The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts? If she was, the insolvent title will prevail. It is not perceived that this vessel can be said to be upon United States territory, or within United States jurisdiction, or subject to the laws of the United States regulating the transfer of property, if such laws there may be. Except for the purposes and to the extent to which these attributes have been transferred to the United States, the state of Massachusetts possesses all the rights and powers of a sovereign state. By her own consent, as found in article 1 of the constitution of the United States, she has abandoned her right to wage war, to coin money, to make treaties and to do certain other acts therein mentioned. None of the subjects there mentioned affect the question before us. The third article of that instrument extends the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction.' This gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs and of crimes committed on the high seas. To bring a transaction within that jurisdiction it must be

situated, does not apply to choses in action.[1] All the property in debts belongs to the creditors to whom they are payable, and follows the creditor's domicile. His domicile fixes the *situs* of this species of property.[2] A non-resident cannot be garnished unless he has the property of the defendant in his possession, or is bound to pay him money in the state where garnished.[3] But property in the hands of a resident, belong-

not simply a transaction which occurred at sea, as the making of a contract, but one in which the question itself is of a maritime nature, or arises out of a maritime affair, or it must be a tort or crime committed on the high seas. Over such cases the United States courts have jurisdiction; that is, they are authorized to hear and determine them. No rule of property is thereby established. This remains as it would have been had no such authority been given to the United States. . . . It is not perceived, therefore, that the relation of Massachusetts to the Union has any effect upon the title to this vessel. It stands as if that state were an independent sovereign state, unconnected with the other states of the Union. The question is the same as if this assignment had been made in London by a British insolvent court, adjudicating upon the affairs of a British subject. We are of the opinion, for the purpose we are considering, that the ship Arctic was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that state passed the title to her in the same manner and with the like effect as if she had been physically within the bounds of that state when the assignment was executed." State Tax on Foreign Bonds, 15 Wall. 300.

[1] Dicey on Domicile, 37.

[2] 21 Cent. Law Jour. 436, note 13; State Tax on Foreign Bonds, 15 Wall. 300; Clark v. Peat Co. 35 Conn. 303; Mead v. Dayton, 28 Conn. 33; Williams v. Ingersoll, 89 N. Y. 523; Osgood v. Maguire, 61 N. Y. 524; Guillander v. Howell, 35 N. Y. 662; Speed v. May, 17 Pa. St. 91; McDougal v. Page, 55 Vt. 187; S. C. 45 Am. Rep. 602; Caskie v. Webster, 2 Wall. Jr. 131; Walters v. Whitlock, 9 Fla. 86; Story, Conf. L. 399; Dicey on Domicile, 264, 37; Freeman on Executions, 310.

[3] Sutherland v. Second Nat. Bank, 78 Ky. 253. Gage v. Maschmeyer, 72 Iowa, 696 (Seevers, J.): "The defendant executed to one Kidder a promissory note, which was not negotiable. An action was brought against Kidder in Cerro Gordo county and a judgment rendered against him therein by a justice of the peace. An execution was issued on the judgment and placed in the hands of a constable of Cerro Gordo county, who went into Worth county, where the defendant resided, and, by virtue thereof, 'summoned the defendant as a garnishee to appear before the justice in Cerro Gordo county and answer as to his indebtedness to Kidder.' In obedience to such notice or summons the defendant did appear and answered that he was indebted to Kidder in the amount of said promissory note. Thereupon Kidder was notified to appear and show cause why judgment should not be rendered against the defendant as garnishee. He did appear and asked that the defendant be discharged, which was overruled and judgment

ing to a non-resident, the property and the garnishee being within the jurisdiction of the court, may be reached.[1] Property in the hands of a carrier *in transitu* cannot be garnished if in actual transit at the time of service of the notice, unless

rendered against the defendant. Before the appearance of the garnishee the note had been assigned to the plaintiff. Such being the facts stated in a question certified to us, we are asked, in substance, whether the judgment against the garnishee is void because the justice did not have jurisdiction to render it. Whether the justice obtained jurisdiction over the defendant by his appearance we have no occasion to inquire. The material question is whether he obtained jurisdiction over the subject-matter of the action, which was the indebtedness due from the defendant to Kidder. A proceeding in garnishment is in the nature of a proceeding *in rem*, and the *res*, or thing which is the subject of the action, must be before the court. The *res* in this case was the indebtedness due from the defendant Kidder. We are of the opinion that it was not before the court, for the reason that it had not been attached or levied upon or seized under the execution; for whatever the constable did in Worth county was absolutely void. He had no power or right to levy an execution issued by a justice of the peace in Cerro Gordo county on property in Worth county, and the indebtedness above mentioned was property. This view is sustained by Rock v. Singmaster, 62 Iowa, 511, and McDonald v. Moore, 65 id. 171. The appellant cites and relies on Smith v. Dickson, 58 Iowa, 444. In that case the jurisdiction of the justice of the subject-matter — that is, the *res* — and of the defendant was conceded. Besides this, there is a material difference in the facts in that case and the one at bar." Plimpton v. Bigelow, 93 N. Y. 596; Bowen v. Pope, 125 Ill. 28. Bates v. C., M. & St. P. R. R. Co. 60 Wis. 302: "Notwithstanding the general language of our statute upon the subject of garnishment, that any creditor shall be entitled to proceed by garnishment, in the circuit court of the proper county, against 'any person (except a municipal corporation) who shall be indebted to or have any property whatever, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions and in the manner prescribed in this chapter' (R. S. sec. 2752), we feel constrained to hold that the personal property or real estate in his possession or under his control must be limited to personal property or real estate within this state; and that in the absence of any fraud or connivance on the part of the garnishee to aid the debtor in defrauding his creditors, personal property or real estate which is lawfully in the possession or under the control of the garnishee outside of this state is not the subject of garnishment under our statute. That personal chattels outside of the state which, if within the state, could be seized by attachment or execution, were not intended to be covered by the statute, is, we think, evident. . . . These provisions clearly indicate that the personal property to be reached in the hands of a garnishee is such as would be subject to seizure by the writ of at-

[1] Molyneux v. Seymour, 30 Ga. 440; 76 Am. Dec. 662.

its destination is within the state, for the domicile of the consignee is the *situs* of the property.[1] If the owner is a resident of the state, and the goods were delivered to the carrier to be carried out of the state, and were not in actual transit, then the goods could be seized or the carrier garnished; but the rule referred to above applies after the goods have started and are to be delivered out of the jurisdiction, for then the *situs* of the goods is the residence of the consignee.

§ 151. Exemptions from seizure.— Exemption laws are not mere regulations pertaining to the remedy. They have

tachment or execution, if they were in the possession of the principal debtor. It is unnecessary to intimate the difficulties and hardships which would result from the enforcement of a rule against garnishees compelling them to deliver up to the processes of the courts of this state any property they may have under their control, belonging to the principal debtor, situated in another state. The difficulty in the case at bar might not be great, because the property, although in fact out of the state when the garnishee summons was served, was not as distant from the place where the court was held which issued it as it might have been within the state. But the rule, if established, must be general, so that if property just beyond the line of the state may be reached, then property in Maine, Louisiana or California, or in any foreign country, may also be reached and held. The difficulties and injustice of enforcing such a rule are apparent. The only case cited by the learned counsel for the respondent in which any court has held that personal property out of the state in which the garnishee process was issued could be reached and held by it is Childs v. Digby, 24 Pa. St. 23. That case was disapproved as bad law by the same court in Penn. R. Co. v. Pennock, 51 Pa. St. 244. The position taken by us upon this question is approved by the Pennsylvania court in the case last cited and also in the following cases: Western R. v. Thornton, 60 Ga. 300; Sutherland v. Second Nat. Bank, 78 Ky. 250; Wheat v. P. C. & Ft. D. R. Co. 4 Kan. 370; I. C. R. Co. v. Cobb, 48 Ill. 402; Lawrence v. Smith, 45 N. H. 533; Tingley v. Bateman, 10 Mass. 343; Clark v. Brewer, 6 Gray, 320; Young v. Ross, 31 N. H. 202."

[1] Bates v. C., M. & St. P. R. R. Co. *supra:* "The exact question is this: Can a common carrier be held liable upon a garnishee summons for personal chattels in his possession in actual transit at the time the summons is served? We think that public policy and the proper discharge of the duties imposed upon common carriers of personal chattels placed in their possession for carriage requires that this question should be answered in the negative; and we think so notwithstanding the very broad language of the statute above quoted. . . . The supreme court of Massachusetts, in the case of Staniels v. Raymond, 4 Cush. 314, held that a person might have the possession or control of the property of another for the time being, and yet not be subject to the trustee process of that state." Wharton, Confl. Laws, 301, 354, 355.

a broader and more equitable signification. There is a sharp distinction between a case where property is not subject to seizure on execution because the law has made no provision by which it can be reached and a case where property is exempted from seizure by reason of public policy. In the first case there is a mere lack of power in the procedure; in the second the law has conferred an existing, substantial and legal right upon the owner, whereby he holds such property as a trustee for the benefit of his family, supported by strong grounds of public policy. In the case of the exemption of household chattels essential to the support, comfort and convenience of a family, or chattels in the nature of tools, implements and means of acquiring a livelihood, by which he provides for their wants, a new incident is attached to the right, property which becomes a right *in rem* that gives protection beyond the mere ownership. The homestead law creates a new estate in the realty, preventing the owner from alienating it, and seems to invest his wife with a sort of joint ownership not separable without the assent of the two parties.[1]

[1] 21 Cent. Law Jour. 426: A surviving widow of the owner of a homestead is the head of a family, and may control rents and profits arising therefrom. Floyd v. Mosier, 1 Iowa, 512. So a widower without children, supporting and having his mother with him, takes the benefit of homestead exemption. Parson v. Livingston, 11 Iowa, 104. So a divorced husband without children in his custody. Woods v. Davis, 34 Iowa, 264. An unmarried woman providing for her deceased sister's children. Arnold v. Waltz, 53 Iowa, 706. The rule applies to an equitable title. The consent of both husband and wife is essential to a conveyance, or a spouse cannot alone convey so as to destroy its character. Lunt v. Neeley, 67 Iowa, 97. Nor can the husband lease it. Pelan v. De Bevard, 13 Iowa, 53. In short, the husband can make no disposition of the homestead without his wife's joining in the conveyance. Babcock v. Hoey, 11 Iowa, 375. Morris v. Sargent, 18 Iowa, 90. 3 Leading Cases Am. Law of Real Property, 78: "As a further consequence of the unity of possession, neither cotenant can, during the existence of the tenancy in common, acquire a homestead; for, if such acquisition were permitted, it would destroy the co-tenancy so far as regarded the land set aside as homestead. Wolf v. Fleischacker, 5 Cal. 244; Reynolds v. Pixley, 6 id. 165; Seaton v. Son, 32 Cal. 481; Thurston v. Maddocks, 6 Allen, 427; Howes v. Burt, 130 Mass. 368; Cameto v. Dupuy, 47 Cal. 79; First National Bank v. Guerra, 61 Cal. 109; West v. Ward, 26 Wis. 579; Avans v. Everett, 3 Lea, 76; Terry v. Berry, 13 Nev. 514; Greig v. Eastin, 30 La. Ann. pt. 2, p. 1130. But in several of the states a homestead may be acquired by a tenant in common, subject to the rights of his co-tenant. Thus, in Iowa, it is held that a home-

It has been held where a corporation operated a railroad in several states that the wages due a person employed by it in one of them, being payable in the state where the services were performed, and being exempt there, could not be garnished by a creditor of the domicile in the courts of another state; the corporation will not be protected in such case unless it notifies the employee and sets up the exemption.[1]

stead may be held in an undivided interest, but the right cannot be claimed and enforced to the detriment of co-tenants; hence, if a tenant in common has erected a homestead on land which cannot be partitioned without injury to his co-tenants, and an execution is levied against a co-tenant, the homestead will have to be sold; but the court, in distributing the proceeds of the sale, will see the value of the homestead and improvement, as distinguished from that of the land, is secured to the person at whose expense and by whose labor they have been made. Thorn v. Thorn, 14 Iowa, 49. In Texas it is also held that a tenant in common may acquire a homestead, to be set out to him on partition, if it can be done without injury to his co-tenants (Clements v. Lacy, 51 Tex. 150; Morgan v. Estate of Morgan, 1 Posey, 400); and in the following states an estate in common will support a claim of homestead (Alabama — Code 1876, sec. 2820; McGuire v. Van Pelt, 55 Ala. 344; Snedecor v. Freeman, 71 id. 140; Arkansas — Greenwood v. Maddox, 27 Ark. 648; Kansas — Tarrants v. Swain, 15 Kan. 146; Michigan — Lozo v. Sutherland, 38 Mich. 168; Minnesota — Kaser v. Haas, 27 Minn. 406; Mississippi — McGrath v. Sinclair, 55 Miss. 89; New Hampshire — Horn v. Tufts, 39 N. H. 478; Vermont — McClary v. Bixby, 36 Vt. 254); and it may be noted that in California, by the act of 1868, a homestead may be acquired in lands held in joint tenancy or in common, where the person filing the declaration is in exclusive possession of the tract sought to be dedicated as a homestead." See Cameto v. Dupuy and First National Bank v. Guerra, *supra*. Homestead cannot be subjected to liability for debts by parol. Rut v. Howell, 50 Iowa, 535. Wharton on Conf. Laws, sec. 571: "If the *lex situs*, therefore, says, 'A certain proportion of the deceased's property is to go to his widow and children, if here resident, for their support,' then the *lex domicilii* will not be internationally considered as having the capacity to withdraw even his personal property from this limitation; nor can the law of his domicile be invoked to sustain the incorporation into his estate of property which by the *lex situs* is to be held on distinct trusts." Bingham's Appeal, 64 Pa. St. 346. "Whether specific property is to be exempted from execution is also a question for the *lex fori*. Whether certain articles of property are exempt for the support of a family depends upon the *lex rei sitæ*, supposing the parties claiming relief are resident in the *situs*. Bronson v. Kinzie, 1 How. 315; Coffin v. Coffin, 16 Pick. 323; Woodbridge v. Wright, 3 Conn. 523; Odiorne's Appeal, 54 Pa. St. 178; Hettrick v. Hettrick, 55 Pa. St. 292; Platt's Appeal, 80 Pa. St. 501; Newell v. Hayden, 8 Iowa, 140.

[1] Pierce v. C. & N. W. R. R. Co. 36 Wis. 286: "The sole question in this case is whether the defendant corpo-

And it has been held that an action will lie against a creditor by a debtor, when the former makes an assignment of his debt for the purpose of evading the exemption laws of the state to a person out of the state, to the end that the assignee bring an action in a foreign jurisdiction, and garnish wages due the debtor which are exempt by the laws of the state where both reside. Also, where a person goes in another state, and sues and attaches exempted wages in the foreign state and appropriates them to pay his judgment there obtained.[1] And, where

ration is protected by the garnishee proceedings in Chicago. The facts upon which the question arises have been stipulated, from which it appears that the plaintiff, who is a married man and the head of a family, residing in Oshkosh, performed work for the defendant at its machine shop in that city in the months of June, 1872, and February and March, 1873, for which he was entitled to receive the amounts specified and which he seeks to recover in this action. In June, 1872, and February, 1873, Louis Pelleton and O. M. Tompkins, residents of Fond du Lac and creditors of the plaintiff, commenced against him in Chicago their respective suits before magistrates in that city and garnished the defendant. In those suits, notices were given and service of process was made according to the laws of Illinois in case of non-resident defendants, and judgments were finally recovered against the plaintiff in these actions, and also against the defendant as garnishee, which the defendant paid and satisfied. It is now claimed that these judgments are conclusive upon the question of the defendant's liability as garnishee in those actions, and constitute a complete defense to this suit. It is also admitted and stipulated that no personal service was had in those suits of any writ, summons or notice upon the plaintiff in this action, and that he has not been in the state of Illinois, temporarily or otherwise, since January 1, 1872; and it is further stipulated that the plaintiff in this action had no actual notice of any of the proceedings in which either of the said judgments was obtained. And the question, therefore, is, What effect must be given these judgments, obtained under such circumstances? Do they protect and discharge the defendant to the extent of the amounts paid upon them? We are all of the opinion that they do not. By the statute of this state, the earnings of a married man who has to provide for the support of a family in Wisconsin, for sixty days next preceding the issuing of any process from any court against him, are exempt, and are not liable to be garnished on attachment. Sec. 40, ch. 134, R. S.; Tay. Stats. 1553; Brown v. Hebard, 20 Wis. 326; Burlander v. M. & St. P. R. R. Co. 26 id. 76; Winterfield v. M. & St. P. R. R. Co. 29 id. 589."

[1] Stark v. Bare, 39 Kan. 103; S. C. 7 Am. St. Rep. 537: "Among other exemptions, it is enacted that the personal earnings of a debtor for three months next preceding the issue of any process against him for the collection of a debt, and which earnings are necessary for the support of the debtor's family, are exempt from such process. This provision has been

the plaintiff and the defendant are each residents of the same state, the exemption laws of the domicile of the parties will be enforced against them in another tribunal out of the state, because such act is in disrespect of the laws in force where the parties reside. Besides, the law imposes on parties and citizens of one state an obligation not to use the process of another state as a means by which to avoid, countervail and escape from the operation of their own laws to the wrong and injury of their neighbors and co-citizens.[1]

frequently sustained and enforced. We have gone further, and held that where a citizen of this state attempts, by a proceeding in attachment or garnishment in another state, to subject to the payment of his debt personal earnings of the debtor which, under our laws, are exempt, and thus prevent such debtor from availing himself of the benefit of the exemption laws of the state, an action by injunction restraining the wrongful action may be maintained by the debtor against such wrong-doer. Zimmerman v. Franke, 34 Kan. 650. In the present case, both parties are citizens of the state, and subject to its laws. According to the allegations of the petition, Stark brought his action in Missouri, at a place far distant from the residence of Bare, for the express purpose of evading the Kansas laws, and wrongfully appropriating the earnings of Bare, to which he was not entitled. We think it is a wrong which may not only be restrained by injunction, but that the citizen who proceeds and inflicts the wrong is liable to the debtor to the extent of the injury sustained. In Nebraska, where a somewhat similar statute exists exempting the personal earnings of the debtor who is the head of a family, a creditor instituted a proceeding in which he appropriated, by garnishment, the earnings of the debtor which were exempt from execution or garnishment process. The debtor subsequently brought suit to recover the amount so wrongfully appropriated, and the supreme court of that state sustained the action, holding that the creditor had procured property to be applied to the payment of his judgment to which he was not entitled, and that he must refund. In disposing of the case the court remarked: 'It is well settled that if exempt property is seized, and applied to the payment of a judgment, the owner may have his action against the wrong-doer, unless such exemption is waived by some act or omission of the debtor.' Albrecht v. Treitschke, 17 Neb. 205. See, also, Philips v. Hunter, 2 H. Black. 408; Vail v. Knapp, 49 Barb. 299; Snook v. Snetzer, 25 Ohio St. 516; Haswell v. Parsons, 15 Cal. 266; Phelps v. Goddard, 1 Tyler, 60. Within the principles of these cases it must be held that the petition states a cause of action." Where a resident of Iowa takes property exempt from execution there to another state for a temporary purpose, a creditor of his who is also a resident of Iowa will be restrained by the courts of the latter state from enforcing against the property a judgment obtained by him in such other state. Mumper v. Wilson, 72 Iowa, 163; East Tennessee R. R. Co. v. Kennedy, 83 Ala. 462.

[1] Lord Ellenborough in Potter v. Brown, 5 East, 129; Pritchard v. Norton, 106 U. S. 124.

The legal effect of the exemption laws attaches a new incident to the owner's interest in such property as is exempted, making his title thereto superior to any interest that a citizen of the same state can acquire within or without the state by the levy of legal process; and such exemption is as against all citizens a right *in rem*, and such right is valid as against all citizens of the state granting the right, at least between the parties, and binding when the property comes within the jurisdiction of another state.[1]

[1] Keyser v. Rice, 47 Md. 211; S. C. 28 Am. Rep. 451: "Such being the general authority of courts of equity over persons and things residing or situate within the limits of the state, it necessarily follows that as to that species of property which has no 'habitat,' but follows the person, such as debts or choses in action, jurisdiction as to the person must include jurisdiction as to the thing. Thus, the chose in action following the person of the creditor, the law of his domicile regulates the disposition of the debt due him. If he dies, his will, executed according to the laws of the state in which he died, determines the disposition of the debt due him; or, if intestate, the distribution follows the law of succession prevailing in the state of his domicile. His assignment (if living) carries the debt to the assignee, unless the same has been previously garnished. So, in case of insolvency, the trustee of the creditor becomes by operation of law the assignee of the debt, and as between citizens of the same state, the creditors of the insolvent are concluded by the discharge of the insolvent court. The almost universal exercise of this power, by the several states, since the adoption of the federal constitution, in the form of exemption laws, and other similar legislation, sanctions, by common consent, its harmony with the constitution of the United States. . . . The power of the state to compel its citizens to respect its laws, even beyond its own territorial limits, is supported, we think, by a great preponderance of precedent and authority. The supreme judicial court of Massachusetts, in the case of Dehon and others v. Foster et al. 4 Allen, 545, in a very learned and lucid opinion by Bigelow, C. J., considered this subject in all its bearings and declared the doctrine to be clear and indisputable that a court of chancery, upon a proper case being made, had authority to restrain persons within its jurisdiction from prosecuting suits either in courts of this state or of other states or foreign countries. This jurisdiction, it affirmed, was not founded upon any right to interfere with, or control the proceedings of, other tribunals in other states, but on the clear authority vested in courts of equity over persons within their jurisdiction and amenable to process to restrain them from doing acts which will work wrong and injury to others, and are contrary to equity and good conscience. In that case, certain creditors of an insolvent firm in Boston, being citizens of Massachusetts, and having reason to believe that proceedings were about to be instituted against the firm, to avoid the operation of the insolvent laws, caused a debt due the insolvents in Philadelphia to be attached. These proceedings were held to be against

§ 152. Exemptions from seizure continued.— While it is a correct rule of law that in the form of the remedy and rules of practice the court will follow the law of its own state, it is nevertheless true that where a right of property has become vested under the laws of a state, or where the law of a state enters into and becomes part of a contract, the interpretation of that contract must be made in view of the law of the forum where the execution took place, for the parties contracted with reference to it. There is still another rule that applies, which is that where fraud or artifice has been used to bring either a person or his property within the jurisdiction of a foreign court, that court will not permit an advantage to be gained over such defendant. Wherever unlawful means are resorted to in order to gain an advantage over a party, such as enticing him within a foreign jurisdiction for the purpose of suit, or fraudulently procuring his property to be brought within the jurisdiction of a foreign court, the law, with great

equity and good conscience, and the attaching creditors were held liable to be restrained by injunction. The exercise of this jurisdiction was said to be sanctioned by precedents in England. In the case of Mackintosh v. Ogilvie, 4 T. R. 193, n., and 3 Swanst. 865, n., this precise point was adjudicated. In that case the plaintiff was assignee of the bankrupt; the defendant, a creditor, who before the bankruptcy went into Scotland, and made arrestments of debts due the bankrupt there. Lord Hardwicke, in giving judgment, said it was like a foreign attachment, by which this court will not suffer a creditor to gain a priority. The jurisdiction was exercised, and injunction issued in that case on the ground that it was against equity for a creditor to evade the laws of his own country and thereby obtain a preference to the injury of other creditors. In the late case of Snook v. Snelzer, the supreme court of Ohio enforced these principles by enjoining a creditor, a citizen of Ohio, from proceeding in an action in West Virginia to subject the earnings of an employee of the Baltimore & Ohio R. R. Co., also a citizen of Ohio, to attachment against said corporations, contrary to the exemption laws of Ohio. The court referred to Engel v. Scheuerman, 40 Ga. 206; S. C. 2 Am. Rep. 573; Dehon v. Foster, 4 Allen, 545; Vail v. Knapp, 49 Barb. 299, as decisive of the question." The case of Ward v. State, 12 Wall. 418, decides that a state cannot enact laws imposing heavier taxes or licenses upon non-resident traders than on resident traders. Referring to the last clause of the constitution, the judge, whilst declining to define the words "privileges and immunities," said, "beyond doubt they among other rights included the right to maintain an 'action in the courts of the state, and to be exempt from higher taxes or excises than are imposed by the state on its own citizens.'" Mumper v. Wilson, 72 Iowa, 164; Teager v. Landsley, 69 Iowa, 725. Also holding that money wrongfully collected could be recovered.

ease and versatility, will apply rules preventing wrong, and afford a remedy applicable to the case so as to prevent injury.[1] How far this rule would apply where the defendant in an execution or attachment proceeding has voluntarily taken his exempt property out of the state for temporary purposes, not changing or intending to change his domicile, and it is attached in the foreign jurisdiction by a creditor of his own state, where the debt was not contracted on the strength of the property, courts may differ; but we believe the rule laid down in Iowa is correct, holding the creditor may be enjoined from prosecuting in the foreign jurisdiction.[2] But the courts of Iowa have also held that where a garnishee pleaded that it was indebted to the defendant, who was one of its employees in Dakota; that he was a married man, the head of a family, a resident of Dakota when the work was performed for which the indebtedness was incurred; that the same had been earned within ninety days prior to the garnishment; that under the laws of said territory said earnings were exempt, and the defendant intervened and pleaded the same facts above stated, that such plea was of no avail.[3] To me there seems to be an

[1] Wharton, Conf. L. secs. 276, 390, n., 366, 310; Bagby v. Atlantic, etc. R. Co. 86 Pa. St. 291; Ward v. Morrison, 25 Vt. 593; Vanbuskirk v. Hartford Ins. Co. 14 Conn. 144; Burlock v. Taylor, 16 Pick. 335; Whipple v. Thayer, 16 Pick. 25; S. C. 26 Am. Dec. 626; Daniels v. Willard, 16 Pick. 38; Wales v. Alden, 22 Pick. 248; May v. Wannemacher, 111 Mass. 202; Richardson v. Forepaugh, 7 Gray, 546; Einer v. Beste, 32 Mo. 240; Freeman on Judgments, sec. 570; Henderson v. Staniford, 105 Mass. 504; Hunt v. Hunt, 72 N. Y. 217. But see Green v. Van Buskirk, 7 Wall. 139; Warner v. Jaffray, 96 N. Y. 248.

[2] Mumper v. Wilson, 72 Iowa, 163.

[3] Broadstreet v. Clark, 65 Iowa, 670 (Seevers, J.): "Upon being garnished, the railroad company answered that it was indebted to Clark, the judgment debtor, who was one of its employees in Dakota territory, and that he was a married man and the head of a family, and a resident of said territory when the work and labor were performed for which the indebtedness was incurred, and that the same had been earned within ninety days prior to the garnishment; that under the laws of said territory said earnings were exempt from execution. Clark, the judgment debtor, intervened in the garnishment proceeding, and in substance pleaded the same facts as above stated, and asked that the garnishee be discharged. Upon motion of the plaintiff, judgment on the answer of the garnishee and petition of the intervention was rendered for the plaintiff, and we are required to determine whether the court erred in the rendition of such judgment. We regard it as the settled rule in this state that the exemption laws of another state

inconsistency in the two holdings which cannot be reconciled; for, if the state enjoins its own citizen from doing an act in another state that it permits to be done by a citizen at home against a citizen of another state, it at least exhibits little respect for the exemption law of such state. The case does not, however, show that the citizenship of the plaintiff and defendant were the same in the case last cited. It, however, appeared that the garnished property was a debt due in Dakota, the residence of the corporation for local purposes; and clearly the *situs* was in that state.[1] The error arises from holding the corporation liable to the process of garnishment in each state through which it runs, when the *situs* of the creation of the debt and earning of the wages should govern, as we shall presently see.

§ 153. Exemptions continued. — We again refer to the case of Broadstreet v. Clark, cited in note to last section, and compare it with what the court said in Mumper v. Wilson, 72 Iowa, 163, in regard to the facts touching the two cases. In the case last cited the court say, "the debt, the obligation of the garnishee, is ambulatory, and exists and is found wherever he may be." This we do not conceive to be true where a non-resident is sued by attachment and the garnishee is not a citizen of the state where the suit is brought, and the debt garnished was contracted in another state. Non-residents, *i. e.*, parties having a residence or domicile out of and beyond the territorial limits of the court, can only be subject to garnishment of property in their possession in the state where garnished; the *res* must be in the state, and the remedy by attachment is not acquired by their accidental or transient presence in the state.[2] The facts in the case seem to, and

or territory cannot be pleaded or relied upon as a defense by either the garnishee or judgment debtor. Newell v. Hayden, 8 Ia. 140; Leiber v. Union P. R. R. Co. 49 Ia. 688; Mooney v. Union P. R. R. Co. 60 Ia. 346. See, also, Burlington & M. R. R. Co. v. Thompson, 31 Kan. 180, and authorities there cited." See § 150, note 2.

[1] See n. 2, p. 433, n. 1, p. 434, and n. 1, p. 435.

[2] Rindge v. Green, 52 Vt. 204: "The plaintiff claims that the county court erred in allowing the claimants to move for the discharge of the trustees. He maintains that, whether they were amenable to and would answer the process served upon them, was personal to the trustees, and could not be taken advantage of by the claimants, who are admitted as parties to the suit only so far as to try their right to the funds in the trustees' hands. If this be so, the trustees

do, show that defendant and garnishee, a foreign corporation, did business in Dakota, and the debt garnished was for labor performed by defendant for the garnishee in that state. The plaintiff was a resident of Iowa; he owed no allegiance to

waived their right and that of everybody to object to the court's taking cognizance of the matter, by appearing by attorney and having the case continued from term to term without objection. A mere privilege personal to a party must be insisted on at the earliest opportunity or it is waived. The method of attaching personal property or a chose in action in the hands of a third person by trustee process is wholly statutory. It did not exist at common law, except by the custom of London and within its territorial jurisdiction. It can therefore be used only in the cases provided for by the statute. The statute gives the right to commence actions by the use of the trustee process only in actions upon contract, express or implied. If an action of tort, or any other action not authorized by the statute, is commenced by trustee process, it has been uniformly held that the action failed because the court had no jurisdiction over the process in the given case, and that the suit would be dismissed on plea or motion of either the principal defendants (Ferris v. Ferris, 25 Vt. 100; Boardman v. Bickford, 2 Aik. 345; Austin v. Grout, 2 Vt. 489; Hill v. Whitney, 16 Vt. 461; Tarbell v. Bradley, 27 Vt. 535) or the trustee (Bradley v. Richmond, 6 Vt. 121; Emerson v. Paine, 9 Vt. 271; Leach v. Cook, 10 Vt. 239), and either at or after the first term. Tarbell v. Bradley, 27 Vt. 535. Hence, the question raised by the motion is not one of personal privilege to be exercised or not to suit the pleasure of the trustee, but a question involving the jurisdiction of the court. . . . When the fact of non-residence was established, and it thereby became determined that the court had not jurisdiction over the trustees nor the debt due from them, any one having any interest in the subject sought to be brought into controversy, and especially the claimants to the fund which was attempted to be brought into adjudication by the use of an inoperative, if not void, process, for the purpose for which it was being used, might move for the discharge of the trustees. Evidently the claimants were not called upon to adjudicate their title or right to a fund over which the court had no jurisdiction, and whose adjudication for that reason, if had, would be a mere consent adjudication, and only binding upon the parties as such. The decision of this court, much relied upon by the plaintiffs in Peck v. Barnum, 24 Vt. 75, is not in conflict, but in harmony, with the views heretofore expressed. In that case the trustees were a partnership having their place of business in this state. Two of the partners resided in this state and managed the business, and the other two resided in New York. It is there held that the debt or chose in action attached by the process is considered as localized and remaining at the residence of the debtor, and not as following the person of the debtor; and that, inasmuch as the place of business of the partnership was in this state, and the managing partners residents of the state, and the debt could be attached by the service of a writ or summons, and that writ under the statutes of the state could be effectually served so as to give jurisdiction

Dakota. The only question is, was the debt ambulatory? The law is that a corporation is a citizen of the state creating it, and its domicile is there only.[1] Wharton, in his work on Con-

to the court where part of the joint debtors resided abroad, the case was within the provisions of the statute authorizing the use of the process. The whole discussion in that case proceeds upon the theory that, if all the partners had resided abroad and carried on their business abroad, the process would not lie." Gage v. Maschmeyer, 72 Iowa, 696; Rock v. Singmaster, 62 Iowa, 511; McDonald v. Moore, 65 id. 171. The above cases hold that, when a person was sued by garnishment process who resided out of the jurisdiction the proceeding was void. The court very properly say in Gage v. Maschmeyer, *supra:* "A proceeding in garnishment is in the nature of a proceeding *in rem*, and *the res or thing which is the subject of the action must be before the court*, for the reason it had not been attached or levied upon, or seized under execution; for whatever the constable did in Worth county was absolutely void. . . . The indebtedness was property." Squair v. Shea, 26 Ohio St. 645. Waples on Attachment and Garnishment, 226, 227: "Where one not a resident of the state in which the attachment suit is brought may be summoned as a garnishee, if within the state, so as to be subject to the process, he must true answer make as to the property of the defendant which he holds within the state, or property held elsewhere which he has obligated himself to deliver to the defendant within the state, and as to debt due defendant payable within the state. He cannot be required to answer touching money or goods over which the court has no jurisdiction. This is true, though he be a resident of the state; for the court may have jurisdiction over him, yet not over property situated at a place to which the jurisdiction does not extend. Both the defendant and the garnishee may be non-residents, yet if the latter be found within the jurisdiction and served with process of garnishment, the proceeding may hold good if he has assets of the defendant within the state. The non-resident garnishee, when found within the state and served with process, becomes personally amenable to the jurisdiction of the court issuing the process, and must answer. If he has nothing of defendant's within the state, and owes him nothing payable within the state, he must so swear, or he may be held contumacious and in fault, and be condemned to pay such judgment as may be rendered if the interrogatories amply cover the whole claim. None but himself is competent to present the state of facts by which he should be exonerated." Sawyer v. Thompson, 4 Foster, 510. See Cronin v. Foster, 13 R. I. 196; Young v. Ross, 11 Foster, 201; Tingley v. Bateman, 10 Mass. 343; Ray v. Underwood, 3 Pick. 302; Hart v. Anthony, 15 Pick. 445; Nye v. Liscombe, 21 Pick. 263; Lovejoy v. Albee, 33 Me. 414; Baxter v. Vincent, 6 Vt. 614; Jones v. Winchester, 6 N. H. 497; Lawrence v. Smith, 45 N. H. 533; Green v. Farmers' & Citizens' Bank, 25 Conn. 452; Miller v. Hooe, 2 Cr. C. C. 622; Bates v. N. O. R. R. Co. 4 Abb. 72; Willet v. Equitable Ins. Co. 10 Abb. 193; Waldron v. Wilcox, 13 R. I. 518; Wheat v. Platte, etc. R. R. Co. 4 Kan. 370.

[1] In Paul v. Virginia, 8 Wall. 168, it is held that corporations are not citi-

flict of Laws, section 363, says: "The remaining theory to be considered is that of the *lex domicilii* of the creditor. This theory is now generally accepted in England and the United States, though it is sometimes urged on grounds which have prevented its universal adoption. *Mobilia sequuntur personam* is a maxim, we are told, peculiarly applicable to debts which have no local site, and which therefore follow the owner. The difficulty about this position is that, if it is good, it subjects debts not to a fixed jurisprudence, *i. e.*, the creditor's domicile, but to a fluctuating jurisprudence, and one that could be changed any day in fraud of third parties, *i. e.*, the creditor's *residence*. The true reason for adopting the creditor's domicile as distinguished from his residence, and as distinguished from the formal place of payment, is that it is into the creditor's domicile that the fund which the obligation represents is ultimately passed."[1]

zens, and have no absolute right of recognition in other states than their own, and may be taxed for the privilege of doing business in a foreign state. See, also, Ducat v. Chicago, 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts, id. 566. In proceedings in United States courts, a corporation is regarded as a citizen of the state creating it. Kansas Pac. v. Atchison R. R. 112 U. S. 414. It has no legal existence beyond the bounds of the sovereignty creating it; and its existence is only in contemplation and force of the law creating it. Ohio & M. R. R. Co. v. Wheeler, 1 Black, 286. Where created by two states, it is two beings in law, creations of distinct sovereignties. Ohio & M. R. R. Co. v. Wheeler, *supra*. See Muller v. Dows, 94 U. S. 444; R. R. Co. v. Whitton, 13 Wall. 270; Ins. Co. v. Francis, 11 Wall. 210; Lafayette Ins. Co. v. French, 18 How. 404; Runyan v. Coster, 14 Pet. 122. The power it exercises in a state not creating it is by comity. Liverpool Ins. Co. v. Mass., *supra*. Anything discharging it from its debts at home discharges it everywhere, it being under the control of the country creating it. Canada Southern R. R. Co. v. Gebhard, 109 U. S. 527; Railroad Co. v. Koontz, 104 U. S. 12; Relfe v. Rundle, 103 U. S. 226; Penn. R. R. Co. v. St. Louis, etc. R. R. 118 U. S. 290.

[1] Wharton on Conf. Laws, sec. 368: To the conclusion that the law of the creditor's domicile determines the law in another state between the creditor's assignee and an attaching creditor may be cited Smith v. Buchanan, 1 East, 6; Caskie v. Webster, 2 Wall. Jr. 131; Braynard v. Marshall, 8 Pick. 194; Mead v. Dayton, 28 Conn. 33; Clark v. Peat Co. 35 Conn. 303 (approved in Pond v. Cooke, 45 Conn. 132); Goodwin v. Holbrook, 4 Wend. 377; Guillander v. Howell, 35 N. Y. 657; Speed v. May, 17 Pa. St. 91; Poe v. Duck, 5 Md. 1; Keyser v. Rice, 47 Md. 203; Klein v. French, 57 Miss. 662; though see Warren v. Copelin, 4 Met. 594; Worden v. Nourse, 36 Vt. 756. In Kirtland v. Hotchkiss, 100 U. S. 491, Harlan, J., speaking of a debt due from a person domiciled in one state to a person domiciled in another,

It seems to the author, then, that where the property is not in the state, it does not follow the steps of the non-resident garnishee, and the court acquires no jurisdiction over it by the garnishment.[1] It may be urged that the garnishee is a resident of the state for the purpose of being sued therein, but garnishment is an attachment of the property and not a suit; and the *res* in such case is not within the jurisdiction of the court. While we concede the rule is that the exemption laws of a foreign state cannot be pleaded in any state but its own, it has been almost universally held that where questions of extraterritorial property arise between foreign assignees and foreign creditors found in the same state, the foreign law to which such parties are subject will be upheld.[2] And this rule has been applied to parties not found in the same

said: "That debt, although a species of intangible property, may, for the purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor." In England, this principle has been affirmed under the following circumstances: By the Roman common law, as adopted in Scotland, an assignment of a debt does not operate until notice is given to the debtor; and hence, under such law, an attachment or "arrest" laid on such debt, the debtor being garnished without notice in such attachment, overrides the assignment. By the English common law, the assignment works an equitable transfer of the debt, without notice; though, if the debtor should innocently pay the debt to the assignor, without notice, the assignee has lost his claim as against the debtor. Notice, by such law, *pendente lite*,— *e. g.*, subsequent to attachment laid, but before execution,— is sufficient to work such equitable assignment. Now, the question is, whether, if a debt due by a Scotch debtor to an English creditor be assigned in England, the debt is equitably transferred to the assignee, as against a subsequent Scotch attaching creditor, though the notice of the assignment to the debtor was not given until after attachment laid? In England it seems to be held that such an assignment operates as an equitable transfer under such circumstances. Solomons v. Ross, 4 T. R. 182, n.; Sill v. Worswick, 1 H. Bl. 691; Selkrig v. Davis, 2 Rose, 315; which case has since been in part overruled, 3 Moore P. C. 230. See note 1, p. 430; note 1, § 149.

[1] See note 1, above.

[2] Hall v. Boardman, 14 N. H. 38; Hoag v. Hunt, 21 N. H. 106; Smith v. Brown, 43 N. H. 44; Dunlap v. Rogers, 47 N. H. 287; Kidder v. Tufts 48 N. H. 125; Whipple v. Thayer, 16 Pick. 25; Richardson v. Forepaugh, 7 Gray, 546; May v. Wannemacher, 111 Mass. 202; Atwood v. Ins. Co. 14 Conn. 555; Plestoro v. Abraham, 1 Paige, 236; Abraham v. Plestoro, 3 Wend. 540; Moore v. Bonnell, 2 Vroom, 90; Richardson v. Leavitt, 1 La. Ann. 430; Einer v. Deynoodt, 39 Mo. 69; Thurston v. Rosenfield, 42 Mo. 474; Warren v. Van Buskirk, 13 Abb. Pr. 145, cited 35 N. Y. 658; R. I. Bank v. Danforth, 14 Gray, 128.

state.[1] But it has been held, and the weight of authority is decidedly that way, that exemption laws are restricted in their operation to the state that enacts them;[2] but the rule is by no means universal and is clearly inequitable. The exemption laws apply to the remedy and may enter into and form part of the contract. True, where a law affects the remedy, it is the *lex fori* that governs,[3] but the law of place may affect the contract itself. Where both parties are citizens of the same state, and the suit is in a foreign jurisdiction, the exemption laws of the state where the parties reside will be enforced.[4]

[1] Green v. Van Buskirk, 5 Wall. 307; 7 Wall. 139. See § 149, note 1, p. 421, and note 1, p. 422.

[2] See § 152, note 2. Exemption laws, like other laws, are restricted in their operation and effect to the state which enacts them. The courts of a state are bound to enforce its own exemption laws, and cannot regard the exemption laws of other states in determining the rights of the parties to an action. Freeman on Executions, sec. 209; Thompson on Homesteads and Exemptions, secs. 20–23; Boykin v. Edwards, 21 Ala. 261; Mineral Point R. R. Co. v. Barron, 83 Ill. 365; Roche v. Rhode Island Ins. Ass'n, 2 Ill. App. 360; Leiber v. U. P. R. R. 49 Iowa, 688, Burlington, etc. R. R. Co. v. Thompson, 31 Kan. 180; 47 Am. Rep. 497; Morgan v. Neville, 74 Pa. St. 52.

[3] Laws granting exemptions from execution affect the remedy only. Helfenstein v. Cave, 3 Iowa, 287; Newell v. Hayden, 8 id. 140. And where a law affects the remedy, it is the *lex fori* and not the *lex loci contractus* that must govern. Woodbridge v. Wright, 3 Conn. 523; Atwater v. Townsend, 4 id. 47; Toomer v. Dickerson, 37 Ga. 428; Whittemore v. Adams, 2 Cow. 626; Smith v. Atwood, 3 McLean, 545; Hinkley v. Marean, 3 Mason, 88.

[4] Roche v. R. I. Ins. Ass'n, 2 Ill. App. 360; Moore v. Chicago R. R. Co. 43 Iowa, 385; Leiber v. U. P. R. R. Co. 49 id. 688; Burlington R. R. Co. v. Thompson, 31 Kan. 180; Morgan v. Neville, 74 Pa. St. 52. In the recent case of Missouri Pac. R. R. Co. v. Maltby, 34 Kan. 131, Valentine, J., in delivering the opinion of the court, said: "Not wishing to state the law more or less broadly than the facts of this case will warrant, we shall decide it purely upon its own facts, and therefore the decision will be in substance as follows: In a proceeding in garnishment, where all the parties are non-residents of the state of Kansas, and are residents of the state of Missouri, and the thing attempted to be attacked by the garnishment proceedings is a debt created and payable in the state of Missouri, but the garnishee does business in Kansas, and is liable to be garnished in this state, and the other parties come temporarily into Kansas, and while in Kansas, the plaintiff, who is a creditor of the defendant, who is a creditor of the garnishee, commences an action in Kansas against the defendant, and serves a garnishment summons upon the garnishee, and the debt of the garnishee to the defendant is by the laws of the state of Missouri exempt from garnishment process, and such debt also seems to come within the exemption provis-

The courts of the state where they reside will enjoin the creditor from prosecuting his suit in a foreign jurisdiction when he so prosecutes to avoid the exemption laws of the state of the domicile of the parties.[1]

The decision of the court in Broadstreet v. Clark may be correct on all grounds except that the court did not by the garnishment acquire jurisdiction over the wages due the defendant because the debt was not in the state and did not have a *situs* therein. Foreign corporations are constantly carrying on business through the law or by virtue of comity, in different states. In the case cited and referred to, the garnishee was not a citizen of Iowa, but did business there, and had an office and agency there and in half a dozen states and territories. We think the correct rule is, in cases of garnishment, that under such facts the debt is owing in the state where the wages are earned and are payable; and such debt is not subject to garnishment in a state not the domicile of the corporation. The *situs* in such cases should be where the business was done, the employment was made and payment was due according to custom. The business out of which the indebtedness arose had its *situs* where done; the laborer there resided; and while the decision under the issues may be correct, as the facts do not show where the residence of the garnishee was, the principle seems to us wrong because jurisdiction was not obtained over the property.[2]

The case of Mooney v. U. P. R. Co. 60 Iowa, 346, is a still stronger one than Broadstreet v. Clark, *supra*. There both parties resided in Nebraska. The wages garnished were exempt. The garnishee was a non-resident of Iowa. The court of Iowa in Mumper v. Wilson, and Iowa cases cited, enjoined

ions contained in section 490 of the civil code of Kansas, and section 157 of the justice's code of Kansas, exempting certain earnings of the debtor from the enforced payment of his debts, such debt is exempt from garnishment process in Kansas."

[1] See note 2, p. 248. But while the laws of a state have no extraterritorial force, the courts of a state may compel its own citizens, residents therein, to respect its laws even beyond its own territorial limits. Engel v. Scheuerman, 40 Ga. 206; Keyser v. Rice, 47 Md. 203; Dehon v. Foster, 4 Allen, 545; Vail v. Knapp, 49 Barb. 299; Burlington, etc. R. Co. v. Thompson, 31 Kan. 180; Freeman on Executions (2d ed.), sec. 209. See note 9 above.

[2] See notes 1 and 2 above.

a plaintiff, a citizen of Iowa, from doing in the courts of Nebraska precisely what they permitted a citizen of Nebraska to do in the courts of Iowa — violate the laws of his state as against a co-citizen thereof. It almost savors of partiality, and surely aids a foreign creditor, to do what the court has declared was inequitable for one of its own citizens to perform. Here is a conflict of law as it appears in the same state.[1] The difficulty arises from not distinguishing between the right to sue and the *situs* of the attached property. It is submitted that while a corporation which operates a railway in a state other than that in which it was incorporated is a resident of such state for the purpose of being sued therein, it yet remains a resident of the state under the laws of which it was organized, and that it is not subject to be garnished in another state on a debt due one of its co-residents, which was neither due nor payable in a foreign state.[2]

[1] See note 1, p. 449; also notes 1 and 2, p. 443. Montrose Pickle Co. v. Dodson Manuf. Co. 76 Iowa, 172; Bates v. Chicago, etc. R'y Co. 60 Wis. 296; S. C. 50 Am. Rep. 369; Bowen v. Pope, 125 Ill. 28.

[2] See n. 2, p. 443, and n. 2, p. 450. Wright v. C., B. & Q. R. R. Co. 19 Neb. 189: "A question similar to that under consideration was recently before the supreme court of Kansas, in Missouri Pacific Railway Co. v. Maltby, 34 Kan. 125. In that case the parties were residents of Missouri, and the debt was contracted there, and by the law of that state the money in the hands of the garnishee was exempt from garnishment, and was also exempt in Kansas. The summons was served on the debtor in Bourbon county, Kansas, and notice of garnishment on the railroad company in the same county. The railroad company filed an answer claiming it was not liable as garnishee, and that the court had no jurisdiction over it, and that the sum due from it to the debtor was exempt from judicial process. The justice, however, refused to act upon this answer. Afterwards the creditor brought an action against the debtor and railroad company to recover $116.40. The railway company and the debtor answered separately, each claiming that the debt due from the railway company was exempt from judicial process; that the railway company was not liable to be garnished for the same, and that the railway company was not liable in the action. The supreme court sustained the answer. It is said (page 289): 'In a proceeding in garnishment where all the parties are non-residents of the state of Kansas and are residents of the state of Missouri, and the thing attempted to be attached by the garnishment proceedings is a debt created and payable in the state of Missouri, but the garnishee does business and is liable to be garnished in this state, and the other parties come temporarily into Kansas, and while in Kansas the plaintiff, who is a creditor of the defendant, who is a creditor of the garnishee, commences an action in Kansas against the defendant and

§ 154. What debts may be garnished.— Under the law of garnishment all indebtedness not exempt from seizure under execution and attachment may be garnished; that is, all that is the subject of an action for a money judgment. Where the

served a garnishment summons upon the garnishee, and the debt of the garnishee to the defendant is by the laws of the state of Missouri exempt from garnishment process, and such debt also seems to come within the exemption provisions contained in section 490 of the civil code of Kansas, and section 157 of the justice's code of Kansas, exempting certain earnings of the debtor from the enforced payment of his debts, such debt is exempt from garnishment process in Kansas.' In Mineral Pt. R. Co. v. Barron, 83 Ill. 365, exemption was claimed under the following provisions of statute: 'The wages and services of a defendant, the head of a family and residing with the same, to an amount not exceeding $25, shall be exempt from garnishment.' The court held that this provision applied to non-residents as well as residents. This was affirmed in C. & A. R. Co. v. Ragland, 84 Ill. 375. In Lowe v. Stringham, 14 Wis. 222, it was held that the statutory provisions relating to the exemption of personal property applied to persons temporarily sojourning within the state, as well as to permanent residents. It is said (page 244): 'It would be entirely inconsistent with the beneficent intentions of the statute, as well as the dignity of a sovereign state, to say that the temporary sojourner or even the stranger within our gates was not entitled to its protection.' In Hill v. Loomis, 6 N. H. 263, it was held that certain specific property was exempt by the laws of that state, even though the debtor resided in another state. To the same effect, see Sproul v. McCoy, 26 Ohio St. 577; Haskill v. Andros, 4 Vt. 609; S. C. 24 Am. Dec. 645; Casey v. Davis, 100 Mass. 124. A few cases may be found in which it has been held the proceedings in cases like that under consideration are valid, but they are placed upon grounds that we cannot approve. While the exemption laws of a state have no extraterritorial effect, yet they should be so construed as to give them effect. The statute is remedial in its nature, and in construing remedial statutes the well-known rule as stated by Blackstone (1 Com. 87) should be applied, viz., to consider the old law, the mischief and the remedy, and to so construe the law as to suppress the mischief and advance the remedy. Here the purpose of the act was to exempt sixty days' wages of the head of a family. The statute is based upon the presumption that the family of a person in the employ of another is usually dependent on such person for support. It can make no difference, therefore, where the family or the head of the family resides, as such wages must be applied to the purposes for which they were intended, the support of the family, or suffering would be the result. It certainly would be a very narrow view of the law to limit its beneficent provisions to residents of the state. This we cannot do, but hold that the language is general in its application, and that sixty days' wages are exempt in favor of the head of a family in all cases, no matter where they reside."

answer of the garnishee does not disclose any indebtedness the statute usually provides that the plaintiff in the garnishee proceedings may traverse such answer by denying that he is not indebted, and set forth a cause of action upon which the garnishee is indebted to the defendant in attachment or execution. This remedy is very effective where the garnishee holds property under a fraudulent assignment by the judgment debtor or attachment defendant.[1] So, also, where the garnishee claims the property under a void assignment for the benefit of creditors.[2] But a creditor cannot garnish an as-

[1] Doe v. Clark, 42 Iowa, 123.

[2] Sperry v. Gallaher, 77 Iowa, 108: "The assignment was general. It embraced all of the debtor's property, except such as was exempt from execution. It was duly acknowledged and recorded, and Gallaher, the assignee, accepted the trust and was proceeding to carry it out when he was garnished. The instrument, after providing for the sale of the property under the direction of the district court, and the collection of the assigned accounts and choses in action, made the following provision as to the payment of creditors: 'To pay over to my creditors of my estate who have filed and proved their claims as provided by law, and under the direction of the court, a *pro rata* share to each, equal in amount due them, at the same rate per cent. if less than the full sum due to them or each of them. In case that any of my creditors who file claims against my estate and receive a dividend therefrom do not receive the full amount due them, then the receipt of any just *pro rata* share of the amount due them shall be deemed a satisfaction of the demand, and so by them accepted.' This provision or condition in the assignment plainly requires the creditors who file claims to accept a *pro rata* share of the estate in full satisfaction of their demands. . . . It is claimed by the appellee that, as the assignee is under the control of the court, the distribution among the creditors may be made by order of the court, and the objectionable feature of the assignment may thus be avoided. But it is very questionable whether the court has the power to change the terms of an assignment. If the plaintiffs in this case had filed their claim and accepted a *pro rata* share under the assignment, by the very terms of the instrument they would have accepted the amounts paid them in full satisfaction. It would have amounted to a composition by a debtor with his creditors. As the assignment was void on its face as to those creditors who repudiated it, we think it was competent for the court to so declare upon the answer of the garnishee, by which it clearly appeared that he held the property and estate of the insolvent by no legal right as against creditors who did not assent to the assignment." Williams v. Gartrell, 4 G. Greene, 287; Berry v. Hayden, 7 Iowa, 473. The garnishee should be protected when he holds under a general assignment. Marder, Luse & Co. v. Wright et al. 70 Iowa, 42. The vice must be apparent on the instrument or it will not be declared void *per se*. Hill v. Agnew, 12 Fed. Rep. 230. See Loeb & Pierpont v. Tuttle, 58 Iowa,

signee of an insolvent, in an attachment against the debtor, on the ground of the assignee's fraud in allowing the debtor to keep out of the assignment money owed by him, since the money never came into the assignee's hands. The case shows, however, that the assignee received less than the creditors under the assignment.[1] The assignee is not liable for money

469. Where fraudulent design will be imputed to debtor making assignment void. Green v. Trieber, 3 Md. 11; Mitchel v. Stiles, 13 Pa. St. 306-9; Nicholson v. Leavitt, 6 N. Y. 510; Wakeman v. Grover, 4 Paige, 41; King v. Glass, 34 N. W. Rep. 820; Hyslop v. Clarke, 14 Johns. 458; Austin v. Bell, 20 Johns. 442; Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Armstrong v. Byrne, 1 Edwards, Ch. 79; Lentilhon v. Moffat, 1 Edwards, Ch. 451; Duggan v. Bliss, 4 Colo. 223; Miller v. Conklin, 17 Ga. 430; Brown v. Knox, 6 Mo. 302; Carlton v. Baldwin, 22 Texas, 724; Hubbard v. McNaughton, 43 Mich. 220. *Contra*, holding conditions that will not vitiate assignment: Robbins v. Butcher, 104 N. Y. 575; Bagley v. Bowe, 105 N. Y. 171; Woonsocket Rubber Co. v. Falley, 30 Fed. Rep. 808; Richardson v. Thurber, 104 N. Y. 606; Redpath v. Tutewiler, 109 Ind. 248; Schoolher v. Hutchins, 66 Tex. 324; Henderson v. Pierce, 9 N. E. Rep. 449; Grubbs v. Morris, 103 Ind. 166; Schwab v. Lemon, 12 N. E. Rep. 87; Palmer v. Mason, 42 Mich. 146; Shapleigh v. Baird, 26 Mo. 322; Atherton v. Ives, 20 Fed. Rep. 894; Mackintosh v. Corner, 33 Md. 598; Rumery v. McCulloch, 54 Wis. 565; Thomas v. Talmadge, 16 O. St. 433.

[1] Cleveland Co-op. Stove Co. v. Wilson, 45 N. W. Rep. 897 (Iowa): "The evidence discloses the following facts: Wilson, being indebted to Cook, executed a chattel mortgage to secure him, and on the same day assigned to him all of his property for the benefit of his creditors. Cook claims under both the mortgage and the assignment, and seeks to enforce both. Plaintiffs insist that the two instruments constitute but one transaction, and are in fact an assignment; and as they give preference to the assignee, Cook, the assignment is void. Cook, in his answer, denies indebtedness to Wilson and liability as a garnishee. We find that Wilson was indebted to Cook in the sum of $525, and owed other persons various sums. He was in mercantile business, and his indebtedness exceeded the value of his property. He was unable to meet his indebtedness, and made an effort to close his business by sale of his stock, in which he was not successful. Cook had pressed him for payment or security of his claim. He finally proposed to Cook that, if he would discount his claim by paying him cash, $250, he would execute a chattel mortgage to secure the claim. He proposed at the same time to assign to him his property for the benefit of his creditors. These propositions were accepted, and the chattel mortgage and assignment were accordingly executed. We find that Wilson was insolvent, and that all his property (excepting, probably, some money) was transferred by the assignment to Cook for the benefit of Wilson's creditors. His indebtedness to Cook existed in good faith. His transaction with Cook was neither payment in full nor security for the full amount of Cook's claim. Cook paid about half the debts in

he never had. Where the assignment is valid on its face the assignee cannot be garnished; though the proceedings were unwarranted in fact, a collateral attack cannot be made because the court has jurisdiction of the assignment.[1] Where

cash in order to acquire the security. Whatever was the motive of this strange transaction, it was not payment nor security in full to the prejudice of other creditors. Indeed, we infer from the evidence that the other creditors will recover larger proportions of their claims than Cook. We may assume, as plaintiffs claim, that the two instruments — the assignment and chattel mortgage — together constitute an assignment. But it was not in fact an assignment with preference against the other creditors. If there were any preference it was in their favor. The person they allege was preferred received a smaller portion of his claim than the other creditors. They cannot complain. It is not the case of preference which the law condemns and will not uphold, but it is the case where the assignee consents to take a little less than fifty cents on the dollar, while the creditors get more than sixty cents. Surely there is no fraud here; certainly none to the prejudice of plaintiffs, and they cannot complain if what they allege to be a fraud is to their benefit. It must be confessed that Cook's transactions with Wilson are strange, and may be irregular, but it is not shown that plaintiffs were prejudiced thereby. They are therefore not entitled to any relief. It is said that Wilson had money held by his daughter, and the money paid him by Cook, which is not covered by the assignment. Let this proposition of fact be admitted. It is not shown that Cook had anything to do with putting the money into the hands of his daughter, and is not, therefore, to be defeated of any of his rights by reason thereof. The law does not defeat an assignment because it does not cover all the assignee's property. Whatever is not assigned may be pursued by the creditors. But it cannot be pursued to the hands of Cook, for it never went therein. Cook cannot be made liable as a garnishee for money which he never had."

[1] Second National Bank of St. Paul v. Schranck, 43 Minn. 38: "In all of the cases heretofore considered by this court, in which the point might have been raised, it has been assumed that a deed of assignment, regular upon its face, purporting to have been made by virtue of the provisions of chapter 148, Laws of 1881, but actually unwarranted by the existence of the facts which alone would justify such an assignment, could be attacked and assailed collaterally; for instance, by proceedings in garnishment against the person who has qualified as assignee, as was attempted in this case. The correctness of this practice has never been questioned, and, as a consequence, it has not been decided, although it was held in Lord v. Meachem, 32 Minn. 66 (19 N. W. R. 346), the assignment being in fact valid, that the assignee could not be garnished, for several reasons, the insuperable one being that the assigned property was *in custodia legis*. But we are clearly of the opinion, in view of the character of the proceedings in insolvency, that in cases where the deed itself is regular, and, upon its face, complete, no distinction can be made, and that this method of adjudicating upon the validity of the assignment

the answer of the garnishee is not traversed it is, of course, taken as true.[1] The mere right of possession of property in the garnishee is not sufficient; hence, where the garnishee has a chattel mortgage on property of the debtor in the latter's possession he is not liable, for he is not bound to incur expense in taking it.[2] A proceeding by garnishment will not reach real estate sold fraudulently by the judgment debtor to the garnishee.[3]

The garnishee does not stand in the relation of a witness, but if his answer is traversed he becomes a party defendant in the action. He cannot be made to appear before any court other than the one before whom the principal cause is pending at the time of the garnishment.[4] No other court has jurisdiction. We apprehend the legislature can, however, make such rules of practice as it desires, as garnishment proceedings are the creature of the statute.

§ 155. Nature of the jurisdiction against garnishee.— The proceeding against the garnishee is undoubtedly a lawsuit, but one of peculiar character from its incipiency to its close. It is commenced as a suit by notice to the garnishee that the attachment creditor has attached him for some, in fact all, debts he owes to the defendant in the attachment proceedings, to the

by collateral attack is irregular, and should no longer prevail. When the assignment is perfected, and to some extent, at least, prior thereto, its entire subject-matter — all that is involved, including the assigned estate — passes under the jurisdiction of the circuit court, *ipso facto;* immediately and without any further act, the assigned property is in the custody of the law. Supervisory authority and control are conferred upon the court, and the insolvent himself yields to its jurisdiction when he files the deed of assignment, and this extends from that time clear through all of the steps which may prove essential, including the final decree. The proceeding, from beginning to end, requires the exercise of judicial power, and is judicial in its nature. Clark v. Stanton, 24 Minn. 232; Kingman v. Barton, id. 295; In re Mann, 32 Minn. 60; 19 N. W. Rep. 347. As the assignments here were apparently valid and well founded in fact, and the proceedings are judicial in their character, it cannot be attacked and assailed collaterally in another judicial proceeding."

[1] Flash v. Norris, 27 La. Ann. 93; Wildner v. Ferguson, 43 N. W. R. 794; 42 Minn. 112. The rule is self-evident. Smalley v. Miller, 71 Iowa, 90.

[2] Smalley v. Miller, 71 Iowa, 90; Curtis v. Raymond, 29 Iowa, 52; First Nat. Bank v. Perry, 29 Iowa, 266.

[3] Boyle v. Maroney, 73 Iowa, 70.

[4] Westphal v. Clark, 42 Iowa, 371; Miller v. Mason & Co. 51 Iowa, 289; Smith v. Dickson, 58 Iowa, 444.

extent of any judgment the plaintiff or attaching creditor may recover against such defendant in the attachment suit, or for the amount of judgment rendered against the defendant, if garnishment proceedings are instituted on execution. In both cases the jurisdiction is the same; the action is commenced in the court where the original suit is pending. The proceedings eventually terminate in a judgment against the garnishee, either discharging or binding him. He becomes a party to the action in a sense. If the principal plaintiff or defendant obtains a change of forum, he, the garnishee, must follow the principal suit. He may appeal; may probably change the venue, if issue is joined on his answer, where there is cause.[1] He, however, cannot change the forum to a federal court, the garnishment proceeding being simply an incident to the main action, unless the latter is removed thereto.[2]

[1] Westphal v. Clark, 42 Iowa, 375: "Appellees' counsel seem to concede that the court was in error in refusing to enter judgment against the garnishee for the reason stated, and they rely solely upon the proposition that, after the change of venue in the main cause, the circuit court for Dubuque county had no further jurisdiction over the garnishment proceedings. Section 2594 of the code provides that 'if less than all of several plaintiffs or defendants take such change, . . . as to those who take no change the cause shall proceed as though none had been taken.' It is claimed that the garnishee was neither a plaintiff nor defendant, and that this section is not applicable to him. We think that he does stand to the case in the attitude of a defendant. It is true he does not enter into the controversy as to whether or not the defendant proper owes the plaintiff; but he is in an attitude that may justify the rendition of a judgment against him. It is difficult to see how he can be in this position without being a party to the suit. . . . If the garnishee should be satisfied that he could not obtain a fair trial in the county wherein the main cause is tried, and should make the proper showing, it would not, we apprehend, be claimed that he would not be entitled to a change of venue. But how could he have a change of venue if he is not a party?" Zanz v. Stover, 2 New Mex. 29; Travis v. Tartt, 8 Ala. 574; Moore v. Stainton, 22 Ala. 831; Jones v. New York & Erie R. R. Co. 1 Grant, 457; Thorn v. Woodruff, 5 Ark. 55; Malley v. Altman, 14 Wis. 22; Gorman v. Swaggerty, 4 Sneed, 560; Smith v. Dickson, 58 Iowa, 444; Caldwell v. Stewart, 30 Iowa, 379; Padden v. Moore, 58 Iowa, 703; Tunstall v. Worthington, Hempstead, 662; Wells v. Am. Ex. Co. 55 Wis. 23. In case of change of forum the garnishee must follow the action. Cook v. Whitney, 3 Woods, 715; Poole v. Thatcherdeft, 19 Fed. Rep. 49; Weeks v. Billings, 55 N. H. 371.

[2] Dillon on Removal of Causes (4th ed.), sec. 41*b*: "And a distinction must here be drawn between original suits and such as are in their nature merely ancillary or sequent to a former action in the state court

Garnishment may be likened to the mistletoe — engrafted on the principal suit, drawing its nourishment from it and dying with it; for if the principal suit is reversed on appeal after the judgment in the garnishment proceeding, that proceeding is suspended, annulled and reversed with it; for in no

The former are removable, the latter not. Thus, a supplemental proceeding which is merely a mode of execution or relief inseparably connected with the original judgment, is not removable, although some new controversy between the plaintiff in the original action and a new party may arise; but where such proceeding is not merely a mode of execution or relief, but involves an independent controversy with a new party, it is removable. Applying this rule, process of garnishment after judgment is a mode of execution and is not removable; but where judgment has been obtained against a corporation, and the plaintiff then proceeds under a state statute against the stockholders, this is an independent controversy to establish a new liability against new parties and a removal may be had in an otherwise proper case. But it is said that a motion, under a state statute in reference to corporations, for execution against a stockholder, cannot be removed to the federal court, as it is not a 'suit at law or in equity' within the meaning of those words as used in the removal acts. Again, a mere auxiliary proceeding, by which a third person intervenes by way of injunction or claim and bond, to protect his property from being seized and sold under a judgment to which he was not a party, is not a removable controversy. Garnishees or trustees holding property or credits of the principal defendant, and joined as defendants for that reason, are generally held not to be within the removal acts, and hence the proceeding in garnishment cannot be transferred to the federal court, unless the main action is first carried there. So, a contest involving the removal of an executor and the appointment of a new one is not removable to the federal court, as it is a mere incident to the settlement of the succession. An action to review and annul the judgment of a state court is not one of which the federal court has original jurisdiction, and such an action is not removable. And as the federal courts cannot enjoin the execution of judgments of the state courts, a suit in a state court in which this is the only relief asked cannot be removed. So, a petition merely ancillary to an ejectment suit already passed to judgment, to have an unsuccessful defendant's improvements valued and allowed to him, under a statute in regard to occupying claimants, is not removable. An incidental controversy which has arisen during the progress of a long continued litigation in a state court, but which did not exist at the time the suit was instituted there, does not entitle the parties thereto to remove the cause to the federal court on the ground of citizenship. See New England Screw Co. v. Bliven, 3 Blatchf. 240, but *quære?* Barney v. Globe Bank (attachment holds the property after removal under the judiciary act, sec. 12), 5 Blatchf. 107. A motion to dissolve an attachment, when authorized by the local laws, may be made in the circuit court after the removal, and in the discretion of the court it

case can the judgment against the garnishee stand after that against the principal defendant has been set aside or reversed.[1]

When the principal defendant has not been personally served and is a non-resident of the state, the proceedings by attachment, being by garnishment, the validity of the judgment against the defendant depends upon whether a judgment is rendered against the garnishee; and, peculiar as it may appear, the personal suit against the garnishee becomes auxiliary to that against the thing or indebtedness in his hands; but if the defendant appears and defends the attachment, the action against him becomes a proceeding *in personam* and the garnishee takes a secondary place, though his position is not changed. The action against the garnishee is hypothetical. At first the right of action against him depends upon the right of the plaintiff to recover in the principal suit. If the plaintiff has a cause of action against the principal defendant, he may maintain a right of action against the garnishee; he stands in such action in the shoes of the principal defendant, and thereby becomes the creditor, for the purpose of the suit, of the garnishee. He must first show, as attachment creditor, that he has a right of action against the defendant, and then the law permits him to be subrogated to the right of a suit against the garnishee. Although the judgment against the garnishee is positive and unqualified, yet the law makes such judgment conditional and dependent upon final judgment against the principal defendant.

The garnishee is always sued by one he owes nothing, to whom he is under no obligations; but he may be made to pay what he owes to the defendant to the plaintiff. The subrogation of the principal defendant's right of action to that of the plaintiff is rightful, subserves the ends of justice and works no hardship upon the garnishee, except that it suspends the payment of indebtedness; that always can be made by the gar-

may be renewed, although it was once argued and denied in the state court. Garden City Mfg. Co. v. Smith, 1 Dillon, C. C. 305. As to custody and disposition of property attached, Dennistoun v. Draper, 5 Blatchf. 336."

[1] Lovejoy v. Albee, 33 Me. 414; Greene v. Tripp, 11 R. I. 424; Pierce v. Carleton, 12 Ill. 358; Whitehead v. Henderson, 4 Sm. & M. 704; Atcheson v. Smith, 3 B. Mon. 502; Desha v. Baker, 3 Ark. 509; Matthews v. Sands, 29 Ala. 136; Flash v. Paul, id. 141; Edrington v. Allsbrooks, 21 Tex. 186.

nishee into the court. The answer of the garnishee, if truthfully made, always absolves him; if he neglects to answer, it is his own fault. The court has power to open the judgment for cause, and the right to appeal is usually awarded him. The garnishee may plead to the jurisdiction of the court over the principal defendant, for whatever discharges the principal defendant discharges him; but he must so plead before answering.[1] All statutory requirements pertaining to jurisdiction must be strictly pursued and observed or the proceedings will be void.[2] Where process of garnishment is served on the same garnishee from two different courts the same day, whether in the same state or a foreign state, the answer of the garnishee, if he discloses an indebtedness, should show in the case in which he was last served the former garnishment so the court can protect him.[3] Where the garnishment is made under a judgment rendered, the return should be made and the proceedings had before the court that issued the execution, and no other court has jurisdiction unless the statute so provides.[4]

As a rule municipal corporations are not subject to garnishment; the exemption is, however, generally made by statute; but it has been held that where not exempted by statute such corporations are not subject to garnishment. The better rule is that they are not liable on principles of public policy to garnishment for the salaries of their officers and with respect to their revenues, but are liable to this process for ordinary debts. Judge Dillon has given this question a most exhaustive examination in his work on Municipal Corporations (fourth edition), and I have copied his note to section 101.[5]

[1] National Bank v. Titsworth, 73 Ill. 591; Wyatt's Adm'r v. Rambo, 29 Ala. 510; Dew v. Bank of Alabama, 9 Ala. 323; Bushnell v. Allen, 48 Wis. 460; Harmon v. Birchard, 8 Blackf. 418; Webb v. Lea, 6 Yerg. 473; Robertson v. Roberts, 1 A. K. Marsh. 247; Featherstonh v. Compton, 8 La. Ann. 285.

[2] Gibbon v. Bryan, 3 Ill. App. 298. And in Illinois the judgment against the garnishee should be in favor of the defendant in execution for the use of the plaintiff. Id.; Railroad v. Todd, 11 Heisk. 549; Greene v. Tripp, 11 R. I. 424; Smith v. McCutchen, 38 Mo. 415; Ford v. Dry Dock Co. 50 Mich. 358; McDonald v. Vinette, 58 Wis. 619; Wells v. Am. Ex. Co. 55 Wis. 23.

[3] Garity v. Gigie, 130 Mass. 184.

[4] McGuire v. Pitts' Sons, 42 Iowa, 535.

[5] 1 Dillon's Municipal Corporations (4th ed.), § 101: "The supreme court of Pennsylvania is of the opinion

§ 156. How jurisdiction is invoked.— The notice of garnishment brings the garnishee before the court where an attachment has been issued, provided a proper return has been made on the writ. Where execution has been issued and the

that on principle a municipal corporation or its officers are not subject to garnishment or attachment or execution, and that by the statutes of that state they are not made liable thereto. Erie v. Knapp, 29 Pa. St. 173; Bulkley v. Eckert, 3 Barr, 368, per Sargeant, J.; S. P. McDougal v. Supervisors, 4 Minn. 184; Bradley v. Richmond, 6 Vt. 121; Burnham v. Fond du Lac, 15 Wis. 193, where the inconvenience of the opposite doctrine is forcibly pointed out by Paine, J.; Merrell v. Campbell, 49 Wis. 535; Drake on Attach. sec. 516; Hadley v. Peabody, 13 Gray, 200; Brown v. Gates, 15 W. Va. 131. Approving text, Droz v. East Baton Rouge, 36 La. Ann. 340; Walker v. Cook, 129 Mass. 577; State v. Eberly, 12 Neb. 616. That the salary of an officer of a municipal corporation cannot be garnished, see School District, etc. v. Gage, 39 Mich. 484; Hebel v. Amazon Ins. Co. 33 Mich. 407; Wallace v. Lawyer, 54 Ind. 501; Merwin v. Chicago, 45 Ill. 133; Chicago v. Hasley, 25 Ill. 595; Thayer v. Tyler, 5 Allen, 95; Colby v. Coates, 6 Cush. 558; Clark v. Mobile, 36 Ala. 621 (salary of school teacher); Hightower v. Slaton, 54 Ga. 108; McLellan v. Young, 54 Ga. 399; S. C. 21 Am. Rep. 276; Hadley v. Peabody, *supra;* or be reached by proceedings supplementary to execution. Roeller v. Ames, 33 Minn. 132. In Missouri, also, it is held, upon general principles, that municipal corporations are not subject to garnishment on account of salary due to their officers. Hawthorn v. St. Louis, 11 Mo. 59; S. P. Fortune v. St. Louis, 23 Mo. 239, where the decision is placed upon the broad ground that such corporations are not liable to be garnished, and not on the ground that an officer's salary is exempt from such process. See, also, Neuer v. O'Fallon, 18 Mo. 277. Since the first edition of this work the supreme court of Missouri has modified in an important respect the broad statement of the doctrine held in former cases. See Pendleton v. Perkins and the City of St. Louis, 49 Mo. 565. It was there held, after great consideration, that a city corporation in that state is subject to garnishment where the main debtor has absconded so that judgment cannot be obtained against him, and he has no property in the state subject to attachment, but has money in the city treasury belonging or due to him, and that it may in such case be reached by bill in equity in the first instance without a previous judgment at law, and without showing fraud or other ground of equitable jurisdiction. It was so decided, notwithstanding the garnishment act in terms exempts municipal corporations from its operation. The opinion of Bliss, C. J., is very full and elaborate. In Tennessee a municipal corporation is not subject to garnishment at the suit of a creditor of one of its employees, citing Bank v. Dibrell, 3 Sneed, 379; Burnham v. Fond du Lac, *supra;* Chicago v. Hasley, 25 Ill. 596; Baltimore v. Root, 8 Md. 102; Hawthorne v. St. Louis, *supra;* Memphis v. Laski, 9 Heisk. 511; S. C. 24 Am. Rep. 327. So in Georgia. McLellan v. Young, *supra.* So in Indiana. Wallace v. Lawyer, *supra.* In Kentucky a city may be garnished in respect of salary due to

garnishment is in aid thereof, the notice of garnishment is the jurisdictional process. When the defendant answers under the writ he is entitled to a discharge, provided no traverse of the answer is made, where the garnishee discloses no indebt-

officers. Rodman v. Musselman, 12 Bush, 354; S. C. 23 Am. Rep. 724. In Connecticut public officers having money in their hands to which an individual is entitled are not subject to garnishment at the suit of the creditors of such individual. Stillman v. Isham, 11 Conn. 123, and cases cited; Ward v. County of Hartford, 12 Conn. 404, 408. And in that state a county, not having power to contract a debt for which an action will lie against it, is not subject to garnishment in such a case. Ward v. County of Hartford, *supra*. But under a statute enabling towns and cities to contract debts, and which provides that debts due from 'any person' to a debtor may be attached, these corporations may be factorized or garnished. Bray v. Wallingford, 20 Conn. 416. In New Jersey, a municipal corporation may be garnished. Davis v. Graves, 9 Vroom, 104; Jersey City v. Horton, 9 id. 88. In Underhill v. Calhoun, 68 Ala. 216 (overruling Smoot v. Hart, 33 Ala. 69), it was held that on grounds of public policy a judgment creditor of a municipal corporation cannot reach by garnishment funds accruing to it by taxation, whether in course of collection or after being paid into the treasury. Mayor v. Rowland, 26 Ala. 498, holds that a municipal corporation cannot be garnished as respects accruing salaries to its officers. See, also, Clark v. School Comm'rs, 36 Ala. 621. But by act of the legislature, 1866, process of garnishment lies against a municipal corporation to subject the wages or salary of a policeman to the satisfaction of a judgment obtained against him. City Council v. Van Dorn, 41 Ala. 505, overruling Mobile v. Rowland and Clark v. Mobile, 36 Ala. 621. In Massachusetts a county is not chargeable as a garnishee for jurors' fees. Williams v. Boardman, 9 Allen, 570. In Maryland, notwithstanding a general statute of the state authorized the garnishment of any 'person or persons whatever, corporate or sole,' it was held that municipalities were not included, and that, upon general grounds of public policy and convenience, the city could not be garnished in respect of money due for the salaries of its officers, although the officer whose salary was attached could have sued the city therefor. Baltimore v. Root, *supra*. The city in this case was garnished in respect of money due from it to a police officer. But in New Hampshire, under a statute making 'any corporation possessed of any money' of the debtor subject to garnishment, a town was held to be included. Whidden v. Drake, 5 N. H. 13. See Brown v. Heath, 45 N. H. 168. In Iowa it was held that the words 'debtor or person holding property' in the attachment act extended to municipal corporations, and that they were subject to garnishment with respect to ordinary debts which they owed the main debtor. Wales v. Muscatine, 4 Iowa, 302. The decision of the court asserts the liability to garnishment on general principles, but subsequently the legislature enacted that 'a municipal or political corporation should not be garnished.' Rev. 1860, sec. 3196. Under the legislation of Iowa, the exemption from garnish-

edness to the defendant.[1] The garnishee may be discharged when the defendant in the action gives a bond undertaking to perform the judgment of the court, for such discharge releases the garnishee.[2] Unless from the proceedings or the untraversed answer of the garnishee, it appears that he is clearly chargeable, he will be discharged.[3] It must appear, to hold the garnishee liable, that he had money or property in his hands, at the time of the garnishment, liable to attachment on execution, or attachment due to the defendant, or coming due, *i. e.*, not exempt from the process.

A traverse of the answer is not only a denial that the garnishee is not indebted, but setting up a cause of action in due form in the nature of a petition or declaration, showing wherein

ment is complete and universal. Jenks v. Township, 45 Iowa, 554. Requisites of notice to corporation. Claflin v. Iowa City, 12 Iowa, 284; Williams v. Kenney, 98 Mass. 142. In Ohio, under a statute which provides that 'any claims or choses in action due, or to become due,' to the judgment debtor, or 'money which he may have in the hands of any person, body politic or corporate,' are subject to execution; salaries of officers of incorporated cities due and unpaid may be subjected by the judgment creditors of such officers to the payment of their judgments, and municipal corporations may be garnished with respect to such salaries. The court admits the conflict in the decisions of other states upon similar statutes, but regards the construction above given as being in accordance with public policy and meaning of the statute. Newark v. Funk, 15 Ohio St. 462. In Illinois municipal corporations are not subject to garnishment in any case, no matter what may be the character of the indebtedness. This position is maintained by Lawrence, J., with great force. Merwin v. Chicago, *supra;* Bivens v. Harper (money in hands of school directors), 59 Ill. 21; Millison v. Fisk, 43 Ill. 112. So in Iowa. Jenks v. Township, *supra.* Waiver. Clapp v. Walker, 25 Iowa, 315. In Minnesota a judgment debtor may be ordered to assign to his creditor a debt due him from a municipal corporation. Knight v. Nash, 22 Minn. 452. In Texas the view suggested in the text is adopted, and, in the absence of a statute, a city is subject to garnishment for an ordinary debt due by it to a third person. City of Laredo v. Nalle, 65 Tex. 359. In Kansas a city cannot be garnished and made liable to pay a creditor of its creditor without express statutory provision. Switzer v. Wellington (Sup. Ct. Kansas, 1882), 28 Am. Law Reg. 281, and note citing and reviewing the cases. Holt, C., said: 'Cities are a part of the government and should not be required to become involved in litigation in which they have no interest. This exemption from garnishment process is based entirely upon the ground of public policy.'"

[1] Wilder v. Shea, 13 Bush, 128.

[2] Myers v. Smith, 29 O. St. 120.

[3] Cairo R. R. Co. v. Killenbury, 82 Ill. 293; Brainard v. Simons, 67 Iowa, 646; Padden v. Moore, 58 Iowa, 703.

he is indebted to the defendant.[1] While such pleading need not be formal, it must be sufficient to constitute a cause of action. The mode of trial is the same as in any other action, and the burden of proof the same.

No final judgment can be rendered against the garnishee in an attachment proceeding until after the final judgment is rendered in the action against the principal defendant; but an interlocutory order may be made directing the retention of the property by the garnishee, or any necessary order for the preservation thereof. The garnishee is not liable for costs unless it be because of the contest; that is under the control of the court rendering the judgment. What we have said on jurisdiction in ordinary actions is applicable to attachment proceedings. That has been discussed in the chapter on proceedings *quasi in rem;* also, where attachments have been issued against non-resident defendants.

§ 157. Conclusion — Who exempt. — In concluding this chapter, lest any mistake may arise because of general remarks made herein, we desire to say that in the words "municipal corporations" we include every variety of corporations for political purposes. The same rule applies to officers of courts holding funds as trustees, guardians, administrators and executors, receivers, assignees of insolvents, assignees in bankruptcy, and the like. This rule does not apply where the issue is one relating to the power, as where the assignment of the insolvent does not comply with the law, not being a general assignment. Nor does the rule apply where the funds are ready to be delivered to the defendant in the attachment proceedings.[2] The rule applies where the money is in the hands of the court, or the officer holds it in legal custody for

[1] Freese v. Co-operative Coal Co. 67 Iowa, 42; Ruby v. Schee, 51 Iowa, 422.

[2] A sheriff may be garnished for money collected by him, and in his hands, belonging to the defendant. King v. Moore, 6 Ala. 160; Lightner v. Steinagle, 33 Ill. 510; Lovejoy v. Lee, 35 Vt. 430. Money deposited with the clerk of a court, in lieu of an undertaking on appeal, is liable to attachment in an action by a third person against the depositor. Dunlop v. Patterson F. Ins. Co. 74 N. Y. 145. And so is money held by the register of a court of chancery when the trust has been discharged except to make payment to the party entitled. Langdon v. Lockett, 6 Ala. 727. See Williams v. Jones, 38 Md. 555.

the settlement of some question pertaining to the ownership or title.

As a rule, garnishment will not lie for the enforcement of an equitable demand;[1] nor will it lie for a contingent liability on contract.[2] And it has been held that it will not lie against a garnishee for an unliquidated demand; but this we doubt, under statutes where debts are assignable, resting in tort, and the assignee may bring an action thereon. It has been argued that such a claim is not a debt. In one sense it is not, but it is an assignable demand in some states, and the liability is not a contingent one. A judgment is a debt that may be garnished.[3] Indebtedness may apply to either contract or tort; it is the owing of money to another.[4] In many cases, where an action for tort would lie, where the defendant is liable under an implied contract, the action for tort may be waived, and a suit in *assumpsit* may be maintained, as where a carrier fails to deliver goods or carry a passenger safely. Much depends on the statute of the state in garnishment proceedings; and technical rules are being abolished.

[1] Webster v. Steele, 75 Ill. 554; Barker v. Esty, 19 Vt. 131.

[2] Girard Fire Ins. Co. v. Field, 45 Pa. St. 129; Boyle v. Franklin Fire Ins. Co. 7 Watts & Serg. 76; Franklin Fire Ins. Co. v. West, 8 id. 350; Knox v. Protection Ins. Co. 9 Conn. 430; Northwestern Ins. Co. v. Atkins, 8 Bush, 328.

[3] See Buchanan Co. Bank v. Railroad, 62 Iowa, 494. When torts are not assignable the rule may be different. A debt payable in merchandise may be garnished. Stadler v. Parmlee, 14 Iowa, 175. Debt payable in county warrant. Ransom v. Stanberry, 22 Iowa, 334. In Lomerson v. Huffman, 25 N. J. L. 625, it is held a sheriff is not subject to garnishment when he is liable for neglect, and many similar cases can be cited. Graham v. Moore, 7 B. Mon. 53; Rundlet v. Jordan, 3 Me. 47, and following cases; Hemmenway v. Pratt, 23 Vt. 332; Barker v. Esty, 19 id. 131; Fish v. Field, id. 141; Foster v. Dudley, 30 N. H. 463; Boardman v. Roe, 13 Mass. 104; Thayer v. Southwick, 8 Gray, 229; Rand v. White Mountains R. R. 40 N. H. 79; McKean v. Turner, 45 id. 203; Dispatch Line v. Bellamy Mfg. Co. 12 id. 205; Getchell v. Chase, 37 id. 106; Leefe v. Walker, 18 La. 1; Ransom v. Hays, 39 Mo. 445; Hugg v. Booth, 2 Iredell, 282; Deaver v. Keith, 5 id. 374. But see Chesapeake Guano Co. v. Sparks, 18 Fed. Rep. 281. Assignee for benefit of creditors. See Hecht v. Green, 61 Cal. 269; Haust v. Burgess, 4 Hughes, C. C. 560; Lewis v. Latner, 72 Me. 487. Unliquidated claim. Barker v. Osborne, 71 Me. 69; Gillman v. Ill. & Miss. Tel. Co. 1 McCrary, C. Ct. 170.

[4] Ochiltree v. Missouri R. Co. 49 Iowa, 150; Stanly v. Ogden, 2 Root, 262; Mattingly v. Wulke, 2 Ill. App. 172.

The proceeding in garnishment attaches the money due the defendant from the garnishee. It is not as important to determine for what the money is owing to the defendant by the garnishee as to determine whether he (the garnishee) in fact owes money to the defendant, recoverable by action. How is the garnishee prejudiced, if he is in fact indebted to the defendant, on a cause of action recoverable in a court of law, by the character of the debt he owes? We think the rule should be that the garnishee is liable and may be garnished for any indebtedness that he does so owe, provided it is one for which the attachment defendant has a direct cause of action against him.

CHAPTER XV.

JURISDICTION IN EMINENT DOMAIN.

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§ 158. Eminent domain — Definition.— Eminent domain is the right or power of a sovereign state to take and appropriate, or to authorize a person, or a public or private corporation, to take and appropriate, private property to a particular use, where the public welfare demands such taking and appropriation, upon making just compensation to the owner.[1]

[1] The phrase "eminent domain" has received many interpretations by authors of great eminence. Cooley's Constitutional Limitations, p. 524: "The power of sovereignty to condem private property for public use." Mills on Em. Domain, sec. 1: "The right which belongs to the society, or to the sovereignty, of disposing in case of necessity, and for the public safety, of all the wealth contained in the state, is eminent domain." Lewis on Eminent Domain, § 1: "Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare." Anderson's Dictionary of Law, 373: "The power to take private property for public uses is termed

The authority exists in every sovereignty to regulate and control all rights that pertain to citizens in common, and are of a public nature, and to appropriate individual property, where necessity, public safety, convenience or the interests of society demand such appropriation. It is sometimes a little difficult to determine whether the appropriation of property is for a public or private convenience or use; but all property appropriated for purposes of public utility, where the appropriation is to an individual, firm or private corporation, is in one sense an appropriation for a private use, but not always where a public convenience is derived from it. It is in the interest of the public that lands which are too wet for agricultural purposes should be drained; the health of the community may demand it; the improvement increases the wealth of the state; yet private owners have a larger interest. The construction of mills, railways, canals, factories, turnpikes, where toll is charged, are all largely in private interest, yet such improvements are for the public benefit, and tend largely to increase the value of property; wherefore we say that all enterprises, even a private way, are in the public interest as well as for private advantage. Eminent domain is a continuing, self-existing attribute of sovereignty in the state, whereby it may permit the appropriation of individual property, whenever the public necessities require the exercise of the power, rather than a reserved right in the grant of property to the citizen.[1]

'the right of eminent domain.' 'Eminent' imports having preference, being paramount, prerogative, sovereign. All separate interests of property are held of the government under the implied reservation that the property may be taken for the public use, upon paying a fair compensation, whenever the public interest requires it. The possession is to be resumed in the manner directed by the constitution and laws. The ultimate right of the sovereign power to appropriate not only the public property but the private property of all the citizens within the territorial sovereignty, to public purposes. Vattel says that the right in society or the sovereign to dispose, in case of necessity, and for the public safety, of all the wealth (property) in the state, is eminent domain, and a prerogative of majesty." United States v. Jones, 109 U. S. 518; Beekman v. Saratoga, etc. R. R. Co. 3 Paige, 72-73; Bloodgood v. Mohawk, etc. R. R. Co. 18 Wend. 13-18; Charles River Bridge v. Warren Bridge, 11 Pet. 641. Vattel is also quoted in 109 U. S. 519.

[1] Noll v. D. B. & M. R. R. Co. 32 Iowa, 66; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. Law (N. C.), 451.

The distinguishing features between taxation and assessments and eminent domain are that the former are a legal, necessary contribution exacted to secure the protection the individual and his property derives from the government; the latter is not taken as the owner's share of contribution for government support, but because the taking is a public necessity, whereby the government or individual taking it becomes indebted for its value, and must make compensation therefor. Taxes and assessments are a debt, when lawfully levied, due to the sovereignty for support and protection, that the protected has impliedly promised to pay. Eminent domain is the appropriation of the property of an individual, arising from public policy or necessity, because of the benefit such appropriation will afford and produce to the community as a whole, for which the individual suffering must be recompensed.[1]

As a rule, the constitution of each state provides that private property shall not be taken for public use without just compensation; but where the constitution is silent the courts have still maintained the rule that compensation must be made to the owner when his property has been taken for such purpose, because of the inherent equitable obligation such taking carries with it.[2]

§ 159. Constitutional provisions and limitations.— In this work we shall not treat of constitutional provisions further than to establish the basis of jurisdiction; the discussion will be limited to an illustration of the general principles, with citations of authorities applicable to the work before us. The fifth article of the amendments to the constitution of the United States laid down a rule applicable to the general gov-

[1] Taxes are defined as being the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government, and for all public needs. Cooley on Taxation, 1; People v. Mayor of Brooklyn, 4 N. Y. 419; Hammett v. Philadelphia, 65 Pa. St. 146; Washington Ave. 69 Pa. St. 352; Turner v. Althaus, 6 Neb. 54.

[2] Martin, Ex parte, 13 Ark. 198; Harness v. Chesapeake, etc. Canal Co. 1 Md. Ch. 248. Harvey v. Thomas, 10 Watts, 63: "The clause by which it is declared that no man's property shall be taken, or applied to public use, without consent of his representatives, and without just compensation, is a disabling, not an enabling, one, and the right would have existed in full force without it."

ernment, preventing it from taking private property for public use without just compensation; but that is not a restraint upon the state governments and does not affect their powers.[1] The right of eminent domain is an independent power vested in the state; all contracts are made and all property is held subject to it; the obligation of contracts is not impaired by the exercise of the right within the meaning of the constitution of the United States.[2] Where condemnation proceedings are in the nature of a suit to ascertain the amount of damage to or value of the property taken, the case may, when justified by the several acts of congress authorizing a change of forum, be transferred from the state to a federal court for trial.[3] The fourteenth amendment to the constitution of the United States, which provides that "no state shall make or enforce any law which shall deprive any person of life, liberty or property, without due process of law," is a direct limitation upon the powers of the state governments, and places these valuable rights under the power and control, as well as the protection, of the general government, from invasion by state enactments. Corporations and artificial persons, as well as citizens and natural persons, are protected by it.[4] The right to compensation

[1] See Mills on Eminent Domain, sec. 341; Barron v. Mayor of Baltimore, 7 Pet. 243; Withers v. Buckley, 20 How. 84; Pumpelly v. Green Bay Co. 13 Wall. 166, 176; Livingston v. Mayor of New York, 8 Wend. 85; Cairo & Fulton R. R. Co. v. Turner, 31 Ark. 494; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. Law (N. C.), 451; Johnston v. Rankin, 70 N. C. 550; Concord R. R. Co. v. Greely, 17 N. H. 47; Martin v. Dix, 52 Miss. 53; Renthorp v. Bourg, 4 Martin (O. S.) (La.), 131.

[2] A toll-bridge owned by a private corporation chartered by the state for that purpose, under the right of eminent domain, under an act of the state legislature authorizing it, may be condemned and taken as part of a public road, compensation being made to the owner. West River Bridge Co. v. Dix, 6 How. 507; Richmond & P. R. R. Co. v. Louisa R. R. Co. 13 How. 71. The same principle will be found declared in the following cases in state courts: Armington v. Barrett, 15 Vt. 745; Enfield Toll Bridge Co. v. N. H. R. Co. 17 Conn. 40; id. 454; Boston & L. R. R. Co. v. Salem & L. R. R. Co. 2 Gray, 1; Cent. Br. Co. v. Lowell, 4 id. 474; Ala. & Florida R'y Co. v. Kenney, 39 Ala. 307; Red River Br. Co. v. Clarksville, 1 Sneed (Tenn.), 176.

[3] Patterson v. Miss. & R. R. Boom Co. 3 Dill. 465; affirmed by supreme court, 98 U. S. 403; Warren v. Wis. etc. R. R. Co. 6 Biss. C. C. 425.

[4] See Mugler v. Kansas, 123 U. S. 622. In Davidson v. New Orleans, 96 U. S. 97, there is a *dictum* by Justice Miller to the effect that the fourteenth amendment, as to due process of law, does not refer to eminent domain; Justice Bradley dissented. See

does not, however, attach in cases where the value of the property is merely impaired, and the title is not divested; nor where the title at the time of the act is not vested in the party affected. This form of construction has been assumed by the courts; and our constitutional provisions, by judicial interpretation, have become flexible things, and judicial power has exerted an influence over constitutional guaranties, which makes the subject of interpretation one of paramount magnitude in our system of jurisprudence.[1] But the courts have held it is not competent for the legislature to provide that if a person shall make improvements upon ground which will be embraced in a street, if subsequently laid out and extended, that he shall not, if such street is thus laid out, be entitled to damages for such improvement. Such a provision is unconstitutional, because it deprives the owner of the use of his lands without compensation.[2]

Cherokee Nation v. Southern Kansas R'y, 135 U. S. 641.

[1] See Sedgwick, Stat. and Const. Law, 533, 534; Dillon on Munic. Corp. sec. 587, 4th ed.

[2] Moale v. Baltimore, 5 Md. 314. Dillon on Munic. Corp. p. 1230: "For a valuable discussion of what constitutes a 'taking' of private property, the reader is referred to the case of Eaton v. B. C. & M. R. R. Co. 51 N. H. 504; S. C. 12 Am. Rep. 147. The opinion of Smith, J., in this case cites most of the leading adjudications and attempts to classify them; and the learned judge evidently favors a less rigid view than is maintained in many of the cases. The precise point held by the court was that the legislature had no power to authorize a railroad corporation to divert the waters of a river, by cutting through, in the course of making their roadbed, a natural bridge, thereby causing the waters, 'sometimes in floods and freshets,' to flow upon the plaintiff's land, carrying thereon sand and gravel, without making provision for his compensation. And the ground of the decision is, that such an injury is a taking of the property within the meaning of the constitution. 51 N. H. 504. The same view has received the full sanction of the supreme court of the United States, which, after recognizing the conflict in the decisions of the state courts, held that 'where the real estate is actually invaded by superinduced additions of water, earth, sand or other materials, or by having any artificial structure placed on it, so as effectually to destroy or impair its usefulness, it is a taking within the meaning of the constitution.' 'This proposition,' says Mr. Justice Miller, who delivered the opinion of the court, 'is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.' Pumpelly v. Green Bay Co. 13 Wall. 168, 181; Ashley v. Port Huron, 35 Mich. 296; Cumberland v. Willison, 50 Md. 138; Arimond v. Green Bay & M. Canal Co. 31 Wis. 316; Rowe v. Portsmouth, 56 N. H. 291; Thurston v. St. Joseph, 51 Mo. 510; Elgin v. Eaton, 83 Ill. 535; Rigney v. Chicago, 102 Ill. 64

Because of the limited meaning placed by the courts on the words "property" and "taken," referred to above, by which the protective scope of the constitutions in reference to the eminent domain provision were by many tribunals confined to a simple trespass upon, or physical invasion or taking of, the property from the owner, and did not include the injuries to the use or enjoyment of his property rights, they did not meet the public sanction or professional judgment. The people to avoid this have, in framing constitutions, added apt words, such as "damaged," "injured," "destroyed," so that the clause in many of the recently adopted constitutions reads: "that private property shall not be taken or damaged for public use without just compensation." The recent decisions, under such amended clauses, have established a more satisfactory rule than formerly prevailed.[1]

(constructing a viaduct so as to deprive plaintiff of access to his house, except by means of stairs); Chicago v. Taylor, 125 U. S. 161. This subject was thoroughly considered by the court of appeals of New York in Story v. N. Y. Elev. R. R. Co. 90 N. Y. 122, the principles of which were restated and adhered to in Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268. In these cases the court, *inter alia*, held that the creation of an elevated railroad, the use of which is intended to be permanent in a public street, and upon which cars are propelled by steam engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement of the abutting owner in the street, and its appropriation by the railroad corporation, thereby rendering it liable to the abutters for damages occasioned by such taking. Party owning a house in which he carries on an inn is not entitled to be compensated for the indirect injury to his trade resulting from the diversion of traffic caused by an unauthorized act in lowering the roadway, but only for direct structural injury occasioned by the unauthorized interference with his cellar. Bigg v. London, L. R. 15 Eq. 376. But see Ricket v. Metrop. R'y Co. L. R. 2 H. L. 175; Duke of Bucleuch v. Metrop. Board of Works, L. R. 5 H. L. C. 418; Beckett v. Midland R'y Co. L. R. 3 C. P. 82; McCarthy v. Metrop. Board of Works, L. R. 7 C. P. 508. See Omaha v. Kramer, 25 Neb. 489; S. C. 13 Am. St. 504; Penn. R. R. Co. v. Marchant, 119 Pa. St. 541; Ohio, etc. R. R. Co. v. Watcher, 123 Ill. 440. Extended note in 5 Am. St. Rep. 537. What damages are recoverable by owner under condemnation proceedings. Sheehy v. Kansas City R'y Co. 94 Mo. 574.

[1] In Montgomery v. Townsend, 80 Ala. 489, the court said: "The constitution requires compensation to be made for the extraordinary changes which may not be due to the natural formation of the surface or to the mode of original construction, as then deemed, sufficient to a safe and convenient way. A material change,

§ 160. What is property within the meaning of the exercise of the right of eminent domain.— The remedial provisions of the constitutional amendments referred to in the foregoing paragraph arose from the restricted and narrow meaning the courts had placed upon the word "property." The word itself conveys no precise and invariable definition, and its meaning was left undefined in the clause of the constitutions concerning eminent domain.[1] A large number of the decisions limited the word "property," as used in those instruments, to the right of the owner to the body of the soil within the exterior limits of his lot; and when in a town or city, and the fee was vested in him, to the street. Such decisions are numerous. They overlook the fact that in legal contemplation the easement is an incorporeal right annexed to the land, and is as much the subject of property as the land itself; the soil or title of the land being a subject of property, the value of which is affected by its surroundings. Property is a congeries of rights secured by the law in, to and over the thing, that in

operating injury to adjoining premises, occasioned by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby or the general appearance of the street improved, is a new description of injury in the enlarged sense of the constitution which casts on the property-owner an additional burden entitling him to compensation. Injuries by the construction of a highway, as provided for in the constitution, include those injuries produced by alterations which could not have been naturally and reasonably anticipated, and damages for which could not have been legally awarded in the preliminary assessment if the land is condemned; or, if dedicated, which the owner would not be estopped to claim. This construction effectuates the cardinal purposes of the constitution,— the protection of the private property, and the equal distribution of the public burdens,— avoids double compensation, and is applicable alike to all corporations, municipal and other, and individuals vested with the privilege of taking private property for public use." See S. C. 84 Ala. 478. Columbus & W. R. R. Co. v. Witherow, 82 Ala. 190: When a railroad company was about to construct its road in the middle of a street on which the plaintiff was an abutting owner and in which he owned the fee, and the company was proceeding to raise an embankment in the street from eight to thirteen feet high, an injunction was granted until security was given for the prepayment of damages. See for similar case Hot Springs R. R. Co. v. Williamson, 45 Ark. 429. Also for a case of grading street by raising grade, see Reardon v. San Francisco, 66 Cal. 492. Railway case in street, Mollandin v. U. P. R. R. Co. 14 Fed. Rep. 394.

[1] Dillon on Munic. Corp. sec. 587a.

the aggregate adds to the value and makes up the title thereto, like the settings of the diamond or ornamental surroundings of the home, adding to the enjoyment and enhancing the power of disposition against competing sellers.[1] The abutting owner's rights in a street and access to and from his farm, the beauty of the surroundings, the convenience and utility of the easements surrounding the owner's possession, are all attachments of value, and as much property as the land itself, and may enter into and form its principal part. The attorney is interested in the nature of the right his client possesses in all such cases.

§ 161. Construction of word "taken."— A construction equally narrow has been placed on the word "taken;" nothing being considered in construing it except a trespass upon, or an appropriation of, the *corpus* of the owner's property, or land, and none of the surrounding rights being regarded. All these essential ingredients that entered into and formed a material portion of the value were left subject to the unlimited control of the legislature without compensation to the owner of property abutting a street, highway or canal; and even a change of the grade could be made, depriving him of the use of the street or highway, cutting him off from access thereto and rendering his property undesirable, provided the land he was the owner of was not disturbed, although its relative value was largely depreciated and the easement he possessed was destroyed.

Had the constitution defined the words "property" and "taken," for the purpose of measuring compensation, all things annexed to the freehold could be considered, and adequate damages could have been obtained. On account of such narrow construction amendments have been made to constitutions and many acts have been passed granting compensation for changing the grade of streets; permitting railways to occupy them only upon making recompense to abutting owners where some right or easement appurtenant to the street and directly connected with it has been destroyed by the new use to which the street, right or easement has been put. The word "damaged" as used in some constitutions would give compensation to the owner for all inherent, surrounding and

[1] See note above; Rigney v. Chicago, 102 Ill. 64, 77, where this question is discussed; Eaton v. B., C. & M. R. R. Co. 51 N. H. 504.

incidental rights of his which have been injured and which injury is not common to the public at large.[1]

[1] See Rigney v. Chicago, 102 Ill. 64. Chicago v. Taylor, 125 U. S. 161: "This action was brought by Moses Taylor, as owner of an undivided interest in a lot in Chicago, having sixty feet front on Lumber street, one hundred fifty feet on Eighteenth street, and three hundred feet on the south branch of Chicago river, to recover the damages sustained by reason of the construction, by that city, of a viaduct on Eighteenth street, in the immediate vicinity of said lot. The city did this work under the power conferred by its charter 'to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same,' and 'to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.' It appears that the construction of the viaduct was directed by special ordinances of the city council. For many years prior to, as well as at the time this viaduct was built, the lot in question was used as a coal yard, having upon it sheds, machinery, engines, boilers, tracks and other contrivances, required in the business of buying, storing and selling coal. The premises were long so used, and they were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth street being greatly obstructed, and at some points practically cut off, and that, as a necessary result of this work, the use of Lumber street, as a way of approach to the coal yard by its occupants and buyers, and as a way of exit for carrying coal from the yard to customers, was seriously impaired. There was also evidence tending to show that one of the results of the construction of the viaduct, and the approaches on either side of it to the bridge over Chicago river, was that the coal yard was often flooded with water running on to it from said approaches, whereby the use of the premises as a place for handling and storing coal was greatly interfered with and often became wholly impracticable. . . . In the constitution of Illinois, adopted in 1848, it was provided that no man's property shall 'be taken or applied to public use without just compensation being made to him.' Art. 13, sec. 11. While this constitution was in force Chicago commenced and substantially completed a tunnel under Chicago river, along the line of La Salle street in that city. It was sued for damages by the Northern Transportation Company, owning a line of steamers running between Ogdensburg, New York, and Chicago, and also a lot in the latter city, with dock and wharfage privileges, the principal injury of which it complained being that, during the prosecution of the work by the city, it was deprived of access to its premises, both on the side of the river and on that of the street. This court, in Transportation Co. v. Chicago, 99 U. S. 635, 641, held that in making the improvement of which the plaintiff complained the city was the agent of the state, performing a public duty imposed by the legislature; and that

§ 162. Words "taking" and "damage;" construction of.— The words "taking" and "damage" have recently, under a more enlightened and liberal construction, received a sounder

'persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted, alike in England and in this country,'— citing numerous cases, among others, Smith v. Cor. of Washington, 20 How. 135. . . . In City of Chicago v. Rumsey, 87 Ill. 348, 368, the supreme court of Illinois, upon a full review of previous decisions, and especially referring to Moses v. Pittsburg, Fort Wayne & Chicago R. R. Co. 21 Ill. 516; Roberts v. Chicago, 26 Ill. 249; Murphy v. Chicago, 29 Ill. 279; Stone v. Fairbury, Pontiac & N. W. R. R. Co. 68 Ill. 394; Stetson v. Chicago & Evanston R. R. 75 Ill. 74, and Chicago, Burlington & Quincy R. R. Co. v. McGinnis, 79 Ill. 269, held it to have been the settled law of that state up to the time of the adoption of the constitution of 1870, that there could be 'no recovery by an adjacent property holder, on streets the fee whereof is in the city, for the merely consequential damages resulting from the character of the improvements made in the streets, provided such improvement has the sanction of the legislature.' . . . The provision in the existing constitution is that 'private property shall not be taken or damaged for public use without just compensation.' An important inquiry in the present case is to the meaning of the word 'damaged' in this clause. The earliest case in Illinois in which this question was first directly made and considered is Rigney v. City of Chicago, 102 Ill. 64, 74, 80. That was an action to recover damages sustained by the plaintiff by reason of the construction by Chicago of a viaduct or bridge along Halstead street and across Kinzie street, in that city, some two hundred and twenty feet west of his premises, fronting on the latter street. There was no claim that the plaintiff's possession was disturbed, or that any direct physical injury was done to his premises by the structure in question. But the complaint was that his communication with Halstead street by way of Kinzie street had been shut off, whereby he was deprived of a public right enjoyed by him in connection with his premises, and an injury inflicted upon him in excess of that sustained by the public. For that special injury, in excess of the injury done to others, he brought suit. The trial court peremptorily instructed the jury to find for the city, holding in effect that the fee of the streets being in the city, there could be no recovery for the obstruction of which the plaintiff complained. That judgment was reversed, an elaborate opinion being delivered, reviewing the principal cases under the constitution of 1848, referring to the adjudications in the courts of other states upon the general question as to what amounts to a taking of private property for public use within the meaning of such a provision as that contained in the former constitution of Illinois. . . . Touching the provision of the constitution of 1870, the court said that the framers of that instrument evidently had in view the giving of greater security to private rights by giving relief in cases of hardship not covered by the preceding constitu-

and less narrow interpretation at the hands of the courts. A broader view has been given to the word "property," embrac-

tion, and for that purpose extended the right to compensation to those whose property had been 'damaged' for public use; that the introduction of that word, so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the state, and abolished the old test of direct physical injury to the *corpus* or subject of the property affected. The new rule of civil conduct introduced by the present constitution, the court adjudged, required compensation in all cases where it appeared 'there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.' The chief justice concurred in the judgment, and in the general views expressed by the court, holding that while the owner of a lot on a street held it subject to the right of the public to improve it in any ordinary and reasonable mode deemed wise and beneficial by the proper public functionaries, he was entitled, under the constitution of 1870, to compensation in case of a sudden and extraordinary change in the grade of the street or highway, whereby the value of his property is in fact impaired. Three of the justices of the state court dissented. As we understand the previous cases of Pekin v. Brereton, 67 Ill. 477; Pekin v. Winkel, 77 Ill. 56; Shawnectown v. Mason, 82 Ill. 337; Elgin v. Eaton, 83 Ill. 535, and Stack v. East St. Louis, 85 Ill. 377,—all of which arose under the present constitution of Illinois,—they proceeded upon the same grounds as those expressed in Rigney v. Chicago, although in no one of them did the court distinctly declare how far the present constitution differed from the former in respect to the matter now before us. . . . In Chicago & Western Indiana R. R. Co. v. Ayres, 106 Ill. 518, the court, all the justices concurring, observed: 'It is needless to say our decisions have not been harmonious on this question, but in the case of Rigney v. City of Chicago, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our constitution. The conclusion there reached was that under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character,— that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of Pittsburg & Fort Wayne R. R. Co. v. Reich, 101 Ill. 157, is in point on this question of damages; and the case of City of Chicago v. Union Building Ass'n, 102 Ill. 379, also reviews the authorities and approves the doctrine in Rigney v. Chicago, *supra*. These cases, therefore, overrule the doctrines of the earlier cases.' Our attention has not been called to, nor are we aware of,

ing more of its essential elements, and signifying the right to the exclusive use, disposition of and control over a thing of

any subsequent decision of the state court giving the constitution of 1870 an interpretation different from that indicated in Rigney v. Chicago and Chicago, etc. R. R. Co. v. Ayres. We concur in that interpretation. The use of the word 'damaged' in the clause providing for compensation to owners of private property appropriated to public use could have been with no other intention than that expressed by the state court." . . . The scope of the charge to the jury is fairly indicated in the following extract: "'The real question is, has the value of the property to sell or rent been diminished by the construction of this viaduct? It may be that it can no longer be used for the purposes of a coal yard, or for any purpose for which it has heretofore been used; but that would not be material if it can be rented or sold at as good a price for other purposes, except that if the proof satisfies you that any of the permanent improvements put on the lot for the particular business which has been heretofore carried on there, and for which it was improved, have been impaired in value, or are not worth as much after this viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged, the plaintiff would be entitled to recover for such damage to the improvements — that is to say, this lot being improved for a specific purpose, if the proof satisfies you that it can no longer be rented or used for that purpose, and that thereby these improvements have been lost or impaired in value, then the impairment of value to these improvements is one of the elements of damage which the plaintiff is entitled to have considered and passed upon and included in his damage.' After a careful consideration of all the propositions advanced for the city, we are unable to discover any substantial error committed to its prejudice." "The English courts," says Mulkey, J., in Rigney v. Chicago, 102 Ill. 81, "in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language (property injuriously affected) is substantially the same as that in our present constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. Chamberlain v. West End of London & C. P. R. Co. 2 Best & Smith, 605; 110 E. C. L. R. 604; id. 617; Beckett v. Midland R. Co. L. R. 1 C. P. 241; on appeal, 3 C. P. 82; McCarthy v. Metrop. Bd. of Works, L. R. 7 C. P. 508. These statutes required compensation to be made where property was 'injuriously affected,' which words the English courts construe as synonymous with the word 'damaged.' Hall v. Bristol, L. R. 2 C. P. 322; East & West India Docks Co. v. Gattke, 3 Macn. & G. 155." See, also, New River Co. v. Johnson, 2 E. & E. 435; 105 E. C. L. R. 434; Rickett's Case, L. R. 2 Eng. & Ir. App. 175; Queen v. Great Northern R. R. Co. 14 Q. B. 25; Queen v. Eastern Counties R. R. Co. 2 Q. B. 347; 42 E. C. L. R. 706; Glover v. North Staffordshire R'y Co. 16 Q. B. 912; Wood v. Stourbridge R. R. Co. 16 C. B. (N. S.) 222; Eagle v. Charing Cross S. R. R. Co. 1 L. R. 2 C. P. 638; Queen v. Vestry of St. Luke's, L. R. 6 Q. B. 572; Columbia Bridge Co. v. Geisse (construing

value, in a manner authorized by law.[1] Lewis on Eminent Domain, section 55, says: "The dullest individual among the people knows and understands that his property in anything is a bundle of rights." Among other things that form part of a man's estate in lands are the right of support of soil, rights arising from environment, highways, light, air, protection afforded by natural barriers against fire, floods, wind, waves, tide-waters, currents, running streams, protection from surface waters, percolating waters, and springs; freedom from smoke, gas, noisome and noxious vapors, disturbances and bad neighbors. Property consists of intangible as well as tangible things, and damages embrace injuries to either or to any right belonging or pertaining to the thing.[2] The leading American case on the subject of damages bearing on the question under discussion is that of Eaton v. B. C. & M. R. R. Co. 51 N. H. 504 (12 Am. Rep. 147), holding that a release by a land-owner to a railway company for all claim of damages on account of constructing a railroad over the plaintiff's land did not operate to prevent him from claiming damages resulting from the

words "may be injured"), 35 N. J. L. 558; Ashby v. White, 1 Smith's L. Cas. 254.

[1] "Property, in its broader and more appropriate sense, is not alone the chattel or the land itself, but the right to freely possess, use and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible." City of Denver v. Bayer, 7 Colo. 113. See, also, Wynehamer v. The People, 13 N. Y. 378, 433; Eaton v. B. C. & M. R. R. 51 N. H. 504, 511; 1 Bl. Com. 138; Austin's Jurisprudence, secs. 47 and 48; Tripp v. Overocker, 7 Colo. 72; East St. Louis v. O'Flynn, 19 Ill. App. 64; Caro v. Metrop. El. R. R. Co. 46 N. Y. Super. Ct. 138.

[2] Sedgwick's Const. Law, 2d ed. pp. 462–468: "To differ from the voice of so many learned and sagacious magistrates may almost wear the aspect of presumption, but I cannot refrain from the expression of the opinion that this limitation of the term 'taking' to the actual physical appropriation of property or a divesting of the title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of government. The tendency under our system is too often to sacrifice the individual to the community, and it seems very difficult in reason to show why the state should not pay for property which it destroys or impairs the value of, as well as for what it physically takes. If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove that, in point of fact, the owner is deprived of property, though a particular piece of property may not be actually taken."

construction of the road over the land of another. Where a railway company, having authority under the right of eminent domain, cut through a ridge on the land of another, near plaintiff's land, and as a result thereof, the plaintiff's land was flooded by freshets when it had formerly been protected therefrom by the ridge, held, that this was a taking of the property of the plaintiff within the meaning of the constitution, and, that the legislature could not authorize the same without providing for compensation, and that due care and prudence by the defendant in the construction of the road where the barrier was broken down would not protect the railroad company.[1]

[1] The case of Eaton v. B. C. & M. R. R. 51 N. H. 504, covers thirty-four pages of the report and cannot be copied. It rests on common-law principles; and the citations of authorities are numerous, hence we quote but two extracts: "To constitute a taking of property, it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' and absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded on a misconception of the meaning of the term 'property,' as used in the various state constitutions. In a strict legal sense land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal significance 'means only the rights of the owner in relation to it.' 'It denotes a right . . . over a determinate thing.' 'Property is the right of any person to possess, use, enjoy and dispose of a thing.' Selden, J., in Wynehamer v. People, 13 N. Y. 378, 433; 1 Blackstone's Com. 138; 2 Austin on Jurisprudence (3d ed.), 817, 818. If property in land consist in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence (3d ed.), 836; Wells, J., in Walker v. O. C. & N. R. R. 103 Mass. 10, 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without *ipso facto* taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property;' although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then he had an unlimited right, now he has only a limited right. His absolute ownership has been reduced to a qualified ownership. . . . If, on the other hand, the land itself be

§ 163. What constitutes a taking.— We have, in the last section, referred to some of the general principles as to what constitutes a taking; but in this work cannot go into a general consideration of the subject under discussion. It is, however, highly proper to state generally the subject of the work. Land consists not only of the soil, but all below, above and surrounding it, when the surroundings add to its utility. Streams of water, lakes, ponds and seas are all subject to prop-

regarded as 'property,' the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting, not mere empty titles, or barren *insignia* of ownership, which are of no substantial value. If the land, 'in its corporeal substance and entity,' is 'property,' still all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make 'property' valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See Comstock, J., in Wynehamer v. People, 13 N. Y. 378, 396. A physical interference with the land, which substantially abridges the right, takes the owner's 'property' to just so great an extent as he is thereby deprived of his right. 'To deprive one of the use of his land is depriving him of his land;' for, as Lord Coke said: 'What is the land but the profits thereof?' Sutherland, J., in People v. Kerr, 37 Barb. 357, 399. The private injury is thereby as completely effected as if the land itself were 'physically taken away.'" See Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Walker v. O. C. & N. R. R. Co. 103 Mass. 10; Thompson v. Androscoggin River Improvement Co. 54 N. H. 545; Pumpelly v. Green Bay Co. 13 Wall. 166, 177 (1871), approved and followed in Arimond v. Green Bay & Miss. Canal Co. 31 Wis. 316 (1872). "Depriving an owner of essential attributes of his property is depriving him of his property." People v. Otis, 90 N. Y. 48, 52. The following are also leading cases on this question: Conniff v. San Francisco, 67 Cal. 45; Hooker v. New Haven & Northampton Co. 14 Conn. 146; S. C. 15 Conn. 312; Denslow v. Same, 16 Conn. 98; Nevins v. Peoria, 41 Ill. 502; Evansville & Crawfordsville R. R. Co. v. Dick, 9 Ind. 433; Kemper v. Louisville, 14 Bush, 87; Lee v. Pembroke Iron Co. 57 Me. 481; Old Colony & Fall River R. R. Co. v. County of Plymouth, 14 Gray, 155; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; O'Brien v. St. Paul, 25 Minn. 331; Wearer v. Boom Co. 28 Minn. 534; McKenzie v. Miss. & Rum River Boom Co. 29 Minn. 288; Peters v. Fergus Falls, 35 Minn. 549; Thurston v. St. Joseph, 51 Mo. 510; Broadwell v. City of Kansas, 75 Mo. 213; Trenton Water Power v. Raff, 36 N. J. L. 335; Story v. New York El. R. R. Co. 90 N. Y. 122; Seifert v. Brooklyn, 101 N. Y. 136; Cogswell v. New York, New Haven & Hartford R. R. Co. 103 N. Y. 10; Lahr v. Metrop. El. R. R. Co. 104 N. Y. 268; Foster v. Stafford National Bank, 57 Vt. 128.

erty rights, and are classified as private non-navigable streams, private navigable streams, and public navigable streams.[1] The only difference in the rights of the riparian proprietors is that the title of the land in the first and second classes is in the adjoining proprietor, while in the third class it is in the public. But in all cases the land-owner has an interest in the stream. Where the land of which he is possessed borders upon it the proprietor has a right of action for any act done to it which injuriously affects him; and hence where the waters of a stream, or any part thereof, are taken or diverted to supply a city or village, or for the use of a canal or railway, or for the improvement of a highway by constructing a new channel, or other public use, compensation must be made to him.[2]

There is also common-law liability for fouling the waters of a stream for public or private use by the sewage of a city, conducting pipes, or casting filth or depositing sawdust in it; and committing similar injuries, where the lower proprietor is injured.[3] So it has been held that the interference with sur-

[1] Gould on Waters, ch. 8.

[2] Ætna Mills v. Brookline, 127 Mass. 69; Harding v. Stamford Water Co. 41 Conn. 87; Stein v. Burden, 24 Ala. 130; Hall v. Ionia, 38 Mich. 493; Higgins v. Fleming Water Co. 36 N. J. Eq. 538; Smith v. City of Rochester, 92 N. Y. 463; Hough v. Doylestown, 4 Brewst. (Pa.) 333. For canal use: Heilman v. Union Canal Co. 50 Pa St. 268; Walker v. Bd. Pub. Wks. 16 Ohio, 540. A railroad company, being a riparian proprietor, may take from a stream a reasonable amount for its locomotives and other use. Penn. R. R. Co. v. Miller, 112 Pa. St. 34. But it cannot take more except by exercise of eminent domain power. Garwood v. N. Y. Cent. & H. R. R. Co. 83 N. Y. 400. Improvement of highways: McCord v. High, 24 Iowa, 336. For improvement of navigation: Avery v. Fox, 1 Abb. (U. S.) 246. Protection of public road: Smith v. Gould, 59 Wis. 631; S. C. 61 id. 21. Diverting stream by railway company a short distance: Cott v. Lewiston R. R. Co. 36 N. Y. 214.

[3] Water taken from a lake: Bailey v. Town of Woburn, 126 Mass. 416; Smith v. Rochester, 92 N. Y. 463. Pollution of water: Holsman v. Boiling Spring Bleaching Co. 14 N. J. Eq. 335. Polluting stream by city actionable: Attorney-General v. Leads, L. R. 5 Ch. App. 583. But see Merrifield v. Worcester, 110 Mass. 216; Butler v. Mayor, etc. 74 Ga. 570. Sewerage case: Morgan v. Binghamton, 32 Hun, 602. Sawdust corruption: Waterman v. Buck, 58 Vt. 519. Changing current of stream: Ten Eyck v. Delaware, etc. Canal Co. 18 N. J. L. 200. Increase of current by bridge of railroad company, causing damage: Evansville R. R. Co. v. Dick, 9 Ind. 433; Dickson v. Chicago, R. I. & P. R. R. Co. 71 Mo. 575; Delaware, etc. Canal Co. v. Lee, 22 N. J. L. 243; C., R. I. & P. R. R. Co. v. Moffitt, 75 Ill. 524; U. P. R. R. Co. v. Dyche, 31 Kan. 120.

face waters is a taking; and the collecting of surface waters in a channel and permitting them to flow on one's land in a body, damming water back so as to do an injury, damming surface water back by leaving an insufficient current, has been held part of the damages.[1]

§ 164. In the exercise of the right of eminent domain, the taking must be for public use.—As the right to take private property for public use originates in necessity, it must be limited thereby; but the legislature is the judge of the necessity of the public which renders the taking expedient in the exercise of the power of eminent domain without the consent of the owner of the property; so it is the judge, alone, of the amount and the estate in land to be taken to subserve the requirements of the public. Hence when a city or municipality is empowered to take lands, and it is necessary for it to do so in order to abate a nuisance, the legislature may provide that the fee of the lands so taken, when purchased or condemned, shall vest in the city. After the purpose for which the land has been taken pursuant to such authority is accomplished the city may dispose of the land for any lawful use.[2] The state has the power to authorize the building of railroads

[1] Gillham v. Madison Co. R. R. Co. 49 Ill. 484; Illinois & St. Louis R. R. Co. v. Fehringer, 82 Ill. 129; Chicago, R. I. & Pac. R. R. Co. v. Carey, 90 Ill. 514; Kankakee & Seneca R. R. Co. v. Horan, 22 Ill. App. 145; Shane v. Kansas City, St. Joe & C. B. R. R. Co. 71 Mo. 237. This is an elaborate case and overrules prior decision. Compare Munkers v. Same, 72 Mo. 514, and Hosher v. Same, 60 Mo. 329. But Shane's Case is in turn overruled in Abbott v. Kansas City & St. Joseph R. R. Co. 83 Mo. 271, and Jones v. St. Louis, etc. R'y Co. 84 Mo. 151. Bentonville R. R. Co. v. Baker, 45 Ark. 252; Payne v. Morgan's La. & Tex. R. R. etc. Co. 38 La. Ann. 164; Texas Central R'y Co. v. Clifton, 2 Tex. App. Civil Cas. 433; Gulf, Col. & S. F. R. R. Co. v. Helsley, 62 Tex. 593; Sabine & East Tenn. R. R. Co. v. Johnson, 65 Tex. 389; Gulf, Col. & S. F. R'y Co. v. Holliday, 65 Tex. 512; Raleigh & Augusta Air Line R. R. Co. v. Wicker, 74 N. C. 220; Drake v. Chicago, R. I. & Pac. R. R. Co. 63 Iowa, 302; Indiana, Bloomington & Western R. R. Co. v. Eberle, 110 Ind. 542; Owens v. Missouri Pacific R. R. Co. 67 Tex. 679. Rule applied to municipal corporations: Maguire v. Cartersville, 76 Ga. 84; Conniff v. San Francisco, 67 Cal. 45; Peters v. Fergus Falls, 35 Minn. 549. Barrier to water caused by embankment obstructing natural flow of surface water: Hogenson v. St. Paul, M. & M. R'y Co. 31 Minn. 224; Rathke v. Gardner, 134 Mass. 14. Collecting surface water in a channel and turning it on land: Arn v. City of Kansas, 4 McCrary, 558; Cubit v. O'Dett, 51 Mich. 347; Seifert v. Brooklyn, 101 N. Y. 136.

[2] Dingley v. Boston, 100 Mass. 544; Page v. O'Toole, 144 Mass. 303; St.

upon, over and across the streets of a city and within the city, without the assent of the municipality, for the city itself is within its control.[1] While, as a rule, it is held that what constitutes a public use or public necessity is for legislative determination,[2] yet if it appears on the face of the legislative

Louis County Court v. Griswold, 58 Mo. 175, establishing Forest Park in St. Louis county; Heyward v. New York, 7 N. Y. 314; Heard v. Brooklyn, 60 N. Y. 242; Heath v. Barmore, 50 N. Y. 302; De Varaigne v. Fox, 2 Blatchf. C. C. 95; Reynolds' Heirs v. Stark County Com'rs, 5 Ohio, 204. City corporations owning land in fee, held entitled to compensation when taken for public use. In re Ninth Avenue & Fifteenth St. 45 N. Y. 729.

[1] Dillon on Municipal Corporations, sec. 701: "Reference is elsewhere made to the plenary power of the legislatures of the states in this country over all public ways, including not only common highways but streets within the limits of municipalities. It has often been decided, and is settled, that the legislature has, unless specially restricted by the constitution, the power to authorize the building of a railroad on a street or highway without the consent of the municipal authorities, and may directly exercise this power or devolve it upon the local or municipal authorities." Savannah & T. R. R. Co. v. Mayor, etc. 45 Ga. 602; Hine v. Keokuk & D. M. R. R. Co. 42 Iowa, 636; Dubach v. Hannibal & St. J. R. R. Co. 89 Mo. 483; People v. Kerr, 27 N. Y. 188; Milwaukee v. Milw. & B. R. R. Co. 7 Wis. 85; Mercer v. Pittsburgh, Ft. W. & C. R. R. Co. 36 Pa. St. 99; Black v. Phila. & R. R. R. Co. 58 Pa. St. 249; Phila. & T. R. R. Co., Case of, 6 Whart. 25, affirmed in Commonwealth v. Erie & N. E. R. R. Co. 27 Pa. St. 339, 354; Green v. Reading, 9 Watts, 382; Henry v. Pittsburgh & A. Br. Co. 8 Watts & S. 85; O'Connor v. Pittsburgh, 18 Pa. St. 189; Tenn. & Ala. R. R. Co. v. Adams, 3 Head, 596; Moses v. Pittsburgh, Ft. W. & C. R. R. Co. 21 Ill. 516; Murphy v. Chicago, 29 Ill. 279; New Orleans & C. R. R. Co. v. Second Municipality, 1 La. Ann. 128; Geiger v. Filor, 8 Fla. 325; Springfield v. Conn. River R. R. Co. 4 Cush. 63; Cosby v. Owensboro & R. R. R. Co. 10 Bush, 288; State v. Hoboken, 35 N. J. L. 205; Paterson & Pas. R. R. Co. v. Paterson, 24 N. J. Eq. 158; Morris & E. R. R. Co. v. Newark, 10 N. J. Eq. 352, 357; Barney v. Keokuk, 94 U. S. 324; Atchison Street R'y Co. v. Missouri Pac. R'y Co. 31 Kan. 660; Harrison v. N. O. Pac. R'y Co. 34 La. Ann. 462; 462; Tilton v. New Orleans City R. R. Co. 35 La. Ann. 1062. In Illinois a city has the power to allow the construction of a railroad upon or over its streets, and the public will be bound by whatever may be lawfully done in regard to the streets by the city. Chicago & N. W. R. R. Co. v. People, 91 Ill. 251; Murphy v. Chicago, *supra*. Compare Indianapolis, B. & W. R. R. Co. v. Hartley, 67 Ill. 439; Chicago, B. & Q. R. R. Co. v. McGinnis, 79 Ill. 269; Bd. of Trade v. Barnett, 107 Ill. 507; Quincy v. Chicago, B. & Q. R. R. Co. 92 Ill. 21.

[2] Lewis on Eminent Domain, sec. 158 and note: "It is manifest that the legislature, in providing for the condemnation of private property, must determine in the first instance whether the use for which it is proposed to make the condemna-

act, where the taking is otherwise lawful, that more land is authorized to be taken than the necessity requires, then such excess is not taken for public use, and the act authorizing the taking is to that extent void.[1]

§ 165. Public use continued.— While it has constantly been held by the courts that private property cannot be taken for private use without the assent of the owner, the thought arises in the mind of every one, What is a public use? To what does it relate? How far does the declaratory act of the legislature extend? What is the boundary line between a public use and a private one? These questions have troubled the courts and the profession for a long time, and are questions of jurisdiction as well as of constitutional law, upon which much thought has been expended and upon which judicial minds differ. It is quite difficult to arrive at an accurate definition, as the facts in every case are affected by the surrounding circumstances. On the one hand corporations are formed for private profit and ends for which they seek the right to condemn property belonging to individuals under the power of eminent domain; the object they have in view is purely speculative. While the improvement contemplated would in one sense enhance the value of property around it and add to the revenues of the state and in that regard benefit the general public, yet the purpose

tion is a public one. But this determination is not final. All the courts, we believe, concur in holding that whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary. Sadler v. Langham, 34 Ala. 311; Matter of Deansville Cemetery Association, 66 N. Y. 569; Young v. Harrison, 6 Ga. 130; Loughbridge v. Harris, 42 Ga. 501; Anderson v. Turbeville, 6 Coldw. 150; Stockton & Visalia R. R. Co. v. Stockton, 41 Cal. 147; Consolidated Channel Co. v. Cent. Pac. R. R. Co. 51 Cal. 269; Harris v. Thompson, 9 Barb. 350; Bankhead v. Brown, 25 Iowa, 540; Tyler v. Beacher, 44 Vt. 648; Dickey v. Tennison, 27 Mo. 373; New Cent. Coal Co. v. George's Creek Coal & Iron Co. 37 Md. 537; Varner v. Martin, 21 W. Va. 534, 550; Talbot v. Hudson, 16 Gray, 417; Pittsburgh v. Scott, 1 Pa. St. 309; Concord R. R. Co. v. Greely, 17 N. H. 47; Coster v. Tide Water Co. 18 N. J. Eq. 54; County Court of St. Louis County v. Griswold, 58 Mo. 175; Scudder v. Trenton Falls Co. 1 N. J. Eq. 694; Dayton Mining Co. v. Seawell, 11 Nev. 394; In re St. Paul & N. Pac. R. R. Co. 34 Minn. 227; Savannah v. Hancock, 91 Mo. 54; McQuillen v. Hatton, 42 Ohio St. 202."

[1] Dunn v. Charleston, Harper, L. (S. C.) 189; Albany Street, In re, 11 Wend. 148; Embury v. Connor, 3 N. Y. 511; Baltimore v. Clunet, 23 Md. 449; Matter of City of Buffalo, 68 N. Y. 167.

underlying the scheme, if purely for private advantage, is not public within the meaning of the law.[1]

No better illustration can be made than to take a subject where the right to exercise the power is clear; hence I take the case of a highway that is a public necessity, and as to which the exercise of the right of eminent domain is unquestionable. The rule is that although a public highway leads to a church, a pleasure drive or to a single family, the exercise of such power is authorized, although the highway ends at a lake, river, mountain or in a *cul de sac*. These facts do not affect the public nature of the road nor the exercise of the right.[2] Yet where

[1] Reyerson v. Brown, 35 Mich. 333; Jordan v. Woodward, 40 Me. 317; Dayton Mining Co. v. Seawell, 11 Nev. 394; Salt Co. v. Brown, 7 W. Va. 191, where the court say: "The case must be clearly a needful one for the public, one that cannot be given up without obvious general loss and inconvenience, that it must be impossible, or very difficult at least, to secure the same public use and purpose any other way than by authorizing the condemnation of the private property." But the majority-view is, the necessity is distinct from the question of public use, and the former question is one of legislative discretion. See Water-works Co. v. Burkhart, 41 Ind. 364; Cooley on Const. Lim. 538; Anderson v. Turbeville, 6 Coldw. 150; People v. Smith, 21 N. Y. 596; Challiss v. A. T. & S. F. R. R. Co. 16 Kan. 126. Authorizing a private corporation to improve marsh lands, excavate one or more basins, docks, wharves and piers, and erect walls, warehouses, furnaces and foundries, factories, etc., for manufacturing is not a public use. Matter of Application of E. B. W. & M. Co. 96 N. Y. 42: "We cannot regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. The enterprise is in substance a private one, and the pretense that it is for a public purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put or the structure intended to be built thereon will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operations of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public." See Scuffletown Fence Co. v. McAllister, 12 Bush, 312; Van Horn's Lessee v. Dorrance, 2 Dall. 304; Palairet's Appeal, 67 Pa. St. 479. Where a private use is combined with one of public utility, so that the two are inseparable, the entire act is void. Attorney-General v. Eau Claire, 37 Wis. 400; Sadler v. Langham, 34 Ala. 311; Cooley's Const. Lim. 530; Coster v. Tide Water Co. 18 N. J. Eq. 63. Read this last case.

[2] It is a public use to take property for a highway leading to a cemetery and church only. West Pikeland Road, 63 Pa. St. 471; Kessinger v.

the act provides for establishing private roads, the use not being intended for the public, the rule is that such taking of property is unconstitutional.[1]

§ 166. What constitutes public use.— The words "public use" are indefinite in meaning when used in connection with the subject of eminent domain. The right to take property for public buildings, school-houses, streets, highways, public parks, and like purposes, is so indisputably free from doubt that no question can be made concerning it, and hence it is not necessary to cite authorities. So the propriety of the exercise of the right for railroads, canals, ferries, turnpikes, macadamized streets, although constructed by corporations, is so manifest that doubts cannot be entertained of the power of the state. Many cases, however, hold that the question of necessity is for the legislature, and is distinct from the use. It would be very doubtful about the exercise of the power for the use of hotels, theaters, fair-grounds, and like purposes.[2] Two definitions have been given the words "public use" by the courts. One of these is that anything for the utility, benefit, advantage of the public, or from which public benefit is derived, even remotely, is a taking for public use. As one court has expressed it, "the words 'public use' mean public utility, advantage, or what is productive of public benefit."[3] The other rule or definition is that the words imply a right of use on the part of the public to a limited extent, at least, supported by a public necessity for condemnation. As above

Hanselman, 33 Ind. 80. Cases where but one family was accommodated: Lewis v. Washington, 5 Gratt. 265; Roberts v. Williams, 15 Ark. 43; Paine v. Leicester, 22 Vt. 44; Drake v. Clay, Sneed (Ky.), 139. But see Fletcher's Heirs v. Fugate, 3 J. J. Marsh. (Ky.) 631; Johnson v. Supervisors of Clayton Co. 61 Iowa, 89; Pagels v. Oaks, 64 Iowa, 198. *Contra*, Knowles' Petition, 22 N. H. 361; Underwood v. Bailey, 59 N. H. 480. Where the termination is a mere *cul de sac:* Schatz v. Pfeil, 56 Wis. 429; People v. Van Alstyne, 3 Keyes, 85; Sheaff v. People, 87 Ill. 189; Masters v. McHolland, 12 Kan. 17. Road terminating at a river: Watson v. Town Council of South Rugstown, 5 R. I. 562. A road to pleasure grounds: Petition Mt. Washington Road Co. 35 N. H. 135; Higginson v. Nahant, 11 Allen (Mass.), 530. To give access to a lumber yard: State v. Bishop, 39 N. J. L. 226; Bankhead v. Brown, 25 Iowa, 540; Hanson v. Vernon, 27 Iowa, 43-50.

[1] Osborn v. Hart, 24 Wis. 89. But see note 3, § 166.

[2] Dayton's Mining Co. v. Seawell, 11 Nev. 349.

[3] Olmstead v. Camp, 33 Conn. 532.

stated, a hotel is for public use, and a public advantage is derived from its construction, which is a matter of public utility; but the necessity for condemnation does not exist, for a lot in some desirable part of the city can be acquired by purchase, while it cannot be so obtained for the construction of a long line of railway, a continuous highway, a canal or a public park. Therefore, the necessity for the exercise of the right of eminent domain arises in the latter cases, and not in the former. Besides, the public must be entitled to in some way use and enjoy the advantage derived; and this is illustrated in the distinction pointed out by the courts between a private way leading to a single house and a public way. The one is private property, under the exclusive control of the single individual, and the other a public road for the benefit of all; while railways and turnpikes, canals and like improvements, constructed by private enterprise for private advantage, are nevertheless for the accommodation of the public in carrying on commerce, giving facilities for rapid travel, and are public necessities to those who are distant from markets and business centers. Such use by the masses, so situate, coupled with the necessity, constitutes the elements for the exercise of the right of eminent domain, where the condemned property will be for *the use of the public.* Every improvement of private property produces remote benefits to the public, increases public revenue, beautifies the surroundings, and in a degree enhances the prosperity of the state. Then two things arise in determining this right: the necessity for condemnation and the direct use to the public the condemned property is to be applied to. Hence where private-road acts have been upheld by the courts it has been done on the ground that they were in their nature public, as appeared from the acts themselves.[1]

[1] In Sherman v. Buick, 32 Cal. 241, 251, the court said: "By distinguishing or classifying roads or highways by the words 'public' and 'private' and providing different modes for their establishment and support, and declaring that the latter class 'shall be, to all intents and purposes, private roads for the use of parties interested,' they give color to the idea that, in their judgment, they have the power to create, and are creating a road for the private use, and to make, and are making it, the private property of certain persons to the exclusion of all others. . . . But it is well understood that the language of the legislature is to be read in all cases by the light of the constitution, with the spirit of which

§ 167. What is public use continued.— While the right of eminent domain has been applied to railroads for their construction, and to depot grounds and the like, requiring particular location, yet property not requiring such location,

it is always presumed to be consistent. In construing it it is the duty of the courts to look to the true object and to trace out the true result, and not to be guided by those which the legislature has mistakenly assumed or declared, and if they be found to be consistent with the constitution, or within the acknowledged power of the legislature, to uphold the act as to its legitimate results and to discard all else. Thus, if the legislature provides for the laying out and establishing of a certain class of roads or highways which from any cause, whether for the purpose of classification or otherwise, is denominated 'private' or as being for the especial benefit of certain individuals upon whom the burden of cost and repair is cast, instead of the public at large, it by no means follows that such roads become the private property or estate of the individuals designated, even if the legislature has so provided in express terms; for where roads are laid out, whether mainly for the accommodation of particular neighborhoods or individuals or not, it must be understood as having been provided for the use of every one who may have occasion to travel it, and hence as being public." So, if the repairs are subject to the control, supervision and management of highway officers. Hickman's Case, 4 Harr. (Del.) 580; Robinson v. Swope, 12 Bush, 21; Brewer v. Bowman, 9 Ga. 37. Waddell's Appeal, 84 Pa. St. 93: "Considering it first as a part of the private road system, can its constitutionality be sustained? The right of the legislature to establish private roads over the land of one man for the benefit of another, for the purpose of access to highways or places of necessary public resort, or even to private ways leading to highways, has never been seriously doubted in Pennsylvania. On the contrary, that right has been distinctly recognized and affirmed. It has, too, been exercised almost continuously ever since the settlement of the province. It is plain, therefore, that the exclusive consideration of the rights of individuals to whom legislative authority to construct private ways has been accorded, does not form the true ground on which the constitutionality of these acts has been predicated. On the contrary, it is the connection of these private ways with public highways, or with places of necessary public resort, together with the implied right or license of the public to use them, at least in going to and from the premises of the person laying them out, quite as much, if not more, as the consideration of purely individual rights, that have won for these acts judicial recognition of constitutionality. The exercise of legislative power for the accomplishment of a purpose in which the general public has an interest, has, indeed, never been gravely questioned anywhere; it will probably never be denied. The private road law of Pennsylvania is not in conflict with the principles to which we have adverted. It does not, strictly speaking, authorize the taking of private property for private use, even after full compensation. The roads laid out under its provisions are *quasi* public roads." Also holding coal under land cannot

although necessary, cannot be taken; such as ground for tenement houses for employees, shops for manufacturing rolling stock, and the like.[1] It will all the time be seen that the question of public use is a paramount one in determining the right to condemn; while where the act is apparently for a private purpose, if the use for which the property is condemned is a public one, and the road, if it be one, be for public use, or the object be one that is essential to public convenience, and can only be attained by condemnation, it is within the jurisdiction or power under discussion. To mention each case will subserve no good purpose, but we have referred to many cases in the notes where the right and power have been recognized, and where they have been denied.[2]

be condemned. See McCandless' Appeal, 70 Pa. St. 210, holding that land for a mere private way cannot be condemned.

[1] State v. Commissioners of Mansfield, 23 N. J. L. 510; Eldridge v. Smith, 34 Vt. 484, a leading case on the subject; Matter of N. Y. etc. R. R. Co. v. Kip, 46 N. Y. 546; West River Bridge Co. v. Dix, 6 How. 507. A canal to supply water for manufacturing, mining and irrigation has been held to be a public purpose in California. Cummings v. Peters, 56 Cal. 593. See Higginson v. Nahant, 11 Allen, 530; Petition of Mount Washington Road Co. 35 N. H. 134; Bryan v. Branford, 50 Conn. 246. As to a road between mines and mills, see Edgwood R. R. Co.'s Appeal, 79 Pa. St. 257; McCandless' Appeal, 70 Pa. St. 210.

[2] The words "public utility" mean the same as "public use." Salt Co. v. Brown, 7 W. Va. 191. Land may be condemned for a public way leading from coal, stone or other mines to a highway or railway, although the law provides the owner of the mines or lessee is to pay all damages for property condemned. Phillips v. Watson, 63 Iowa, 28: "The first objection urged against the right to appropriate the land to the use intended is that the statute under which the appropriation was sought to be made is in conflict with the constitution both of the United States and of this state. The act in question is chapter 34 of the acts of 1874. It is entitled, 'An act authorizing the establishment of public ways to lands having stone and mineral thereon;' and it provides that any person owning or being in possession as lessee of any lands having any coal or stone, lead or other mineral thereon or thereunder, may have a public way established over the lands of others, from any railroad or highway, to any mine or quarry on said lands. It also provides that in case the owner of any lands necessary to be taken for such purpose refuses to grant the right of way, or if the person seeking to have such way established and the owner of such lands cannot agree upon the compensation to be paid therefor, the sheriff of the county shall appoint six freeholders of the county, who shall inspect the premises and assess the damages which the owner of the land sought to be appropriated will sustain by reason

§ 168. Rules governing the exercise of the power of eminent domain.— The legislature may exercise the power of

of the appropriation thereof. The damages so assessed, and all costs of the proceeding, are to be paid by the person seeking to have the way established; and if the way, when constructed, passes through inclosed lands, he is required to fence it on both sides. And it is provided in the fourth section of the act that any person who has paid the damages assessed for a highway established under the act may construct and maintain a railway thereon, for the purpose of reaching and operating his quarry or mine, and of transporting the product thereof to market. The act does not make any provision for the expenditure of public money, or of labor, under the direction of public officers, in the improvement or repair of the ways which may be established under its provisions. Nor is there any provision in the act in any manner defining the rights or privileges of the public with reference to the roads so established. The specific objection to the act is that, inasmuch as it provides for the establishment of a way only in case the mine owner shall make application therefor, and imposes on him the burthens incident to its establishment and maintenance, and confers on him the exclusive right to use it in a manner entirely different from that in which public highways ordinarily are used, and which necessarily has the effect, in a great degree, to exclude the public from its use, the use to which it appropriates the ground taken for right of way is a mere private use. . . . If the purpose and effect of this statute were to confer on the mine owner the exclusive right to occupy and use the ground appropriated, for the purpose of reaching and developing his mine, and of transporting the product thereof to market, and the only rights intended to be conferred on the public are such advantages and conveniences as may accrue to it incidentally from the developing of the mine and the marketing of the product, we would have no hesitancy in holding that it could not be sustained; for, in that case, the use to which the property appropriated would be put would be essentially a private use. We think, however, that this was not the purpose of the legislature in enacting the statute, and that it does not have this effect. We ought not to declare any act of the legislature void, if a construction can fairly be put upon it under which it can be sustained. In the title as well as in the body of the act, the ways for the establishment of which it provides are described as public ways, and the legislature must be presumed to have intended that they should be public ways, in the ordinary sense in which that term is used; that is, that the public should have the right to use, occupy and enjoy them as ways or roads. . . . We conclude, therefore, that a road or way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it; and that the mine owner who procured it to be established must use the special privileges which the act confers on him in such manner as not to destroy this right of the public or prevent its enjoyment." De Camp v. Hibernia, etc. R. R. Co. 47 N. J. L. 43, also 518. A different rule is held in Illinois. Chicago & Eastern Ill. R. R. Co. v.

eminent domain by directing or authorizing the condemnation

Wiltse, 116 Ill. 449; Sholl v. German Coal Co. 118 Ill. 427. But see, supporting the rule, Waddell's Appeal, 84 Pa. St. 90. A condemnation can be had for public parks. County Court v. Griswold, 58 Mo. 175; Brooklyn Park v. Armstrong, 45 N. Y. 234; Woodstock v. Gallup, 28 Vt. 587; Bryan v. Branford, 50 Conn. 246. The exercise of the right applies to telegraph lines. Concord R. R. Co. v. Greely, 17 N. H. 47; Pierce v. Drew, 136 Mass. 75; New Orleans, etc. R. R. Co. v. Southern, etc. Tel. Co. 53 Ala. 211. Also to conduct petroleum in tubes. West Va. Trans. Co. v. Volcanic Oil, etc. Co. 5 W. Va. 382. Also for buildings of all kinds for public use. Hildreth v. Lowell, 11 Gray, 345; St. Helena Water Co. v. Forbes, 62 Cal. 182; Thorn v. Sweeney, 12 Nev. 251; Lumbard v. Stearns, 4 Cush. 60; State v. Eau Claire, 40 Wis. 533; Cummings v. Peters, 56 Cal. 593; Kane v. Mayor, etc. of Baltimore, 15 Md. 240; Reddall v. Bryan, 14 Md. 444; Wayland v. County Com'rs, 4 Gray, 500; Burden v. Stein, 27 Ala. 104, 116; Riche v. Bar Harbor Water Co. 75 Me. 91; Olmsted v. Proprietors of Morris Aqueduct, 46 N. J. L. 495 (affirmed by court of errors, 47 N. J. L. 311); Stamford Water Co. v. Stanley, 39 Hun, 424; Matter of New Rochelle Water Co. 46 Hun, 525. And see Burt v. Merchants' Ins. Co. 106 Mass. 356. For improved navigation. Matter of Deansville Cemetery Ass'n, 66 N. Y. 569; Evergreen Cemetery Ass'n v. Beecher, 53 Conn. 551. Grist-mills are within the act. Boston, etc. Mill Corp. v. Newman, 12 Pick. 467; Scudder v. Trenton, etc. Co. 1 N. J. Eq. 694. The right has been denied to saw-mills and paper-mills. Harding v. Goodlet, 3 Yerg. (Tenn.) 41. But the rule in Connecticut is different. Olmstead v. Camp, 33 Conn. 532. So in Indiana. Hankins v. Lawrence, 8 Blackf. 266. And see Murdock v. Stickney, 8 Cush. 113. Also see Head v. Amoskeag Manuf. Co. 113 U. S. 9; Burnham v. Thompson, 35 Iowa, 421; Harding v. Funk, 8 Kan. 315, holding that mills might be called *quasi* public mills, and the right sustained by general usage. Jordan v. Woodward, 40 Me. 323: "The private property of one citizen cannot be taken and given to another citizen for private uses. Except for public uses, private property may not be taken by the dominant power of the state, nor for public uses, without just compensation, nor even then, unless the public exigencies require. That is to say, there must be a pressing public necessity, to justify the invasion of private right by the superior power of the state, and this exercise of power over private property, when justified by the public necessities, cannot be extended beyond what the public exigencies require. The mill act, as it has existed in this state, pushes the power of eminent domain to the very verge of constitutional inhibition. If it were a new question, it might be well doubted whether it would not be deemed to be in conflict with that provision of the constitution cited above. In the early history of this country, the erection of mills was deemed matter of great public convenience and necessity, and as such, deserving the special protection of the legislative power. There were then few mills in the country, and little capital with which to construct them, while land was abundant, and to a great extent unoccupied, and comparatively of little value. Hence, the origin of the policy, and grounds of its justification or excuse. But the

of property, by the officers of corporations, municipal or pri-

reasons in which this policy originated have long since ceased to exist. Private capital has largely accumulated, and now seeks investment in mills of various descriptions, or in other enterprises for private gain. That the existence of water-mills is matter of public convenience at this day is undeniable; so, too, is the existence of the shop of the smith, the store of the grocer, the house of the innholder, and a great variety of business enterprises in which our citizens employ their labor and capital. In fact, there is no branch of lawful business which may not contribute to the public good, and for which there may not, to a certain extent, exist a public necessity. Yet, to authorize the appropriation of private property for all these various purposes, would be destructive to private rights, and unsettle the tenure by which property is holden. Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well-defined rights to that use secured, as the right to use the public highways, the turnpike, the public ferry, the railroad, and the like. But when it is so appropriated that the public have no right to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use." The right to exercise the power of eminent domain in the construction of mills other than grist-mills is denied in many states. Bottoms v. Brewer, 54 Ala. 288; Loughbridge v. Harris, 42 Ga. 501. Even as to a grist-mill in Michigan. Ryerson v. Brown, 35 Mich. 333, Judge Cooley's able opinion; Tyler v. Beacher, 44 Vt. 648. On the whole the right is doubtful, and rests more upon precedent than reason. See Cooley, Const. Lim. pp. 67-72; Lewis on Eminent Domain, sec. 181. In some states the doctrine has been extended to mines. Dayton Mining Co. v. Seawell, 11 Nev. 394. Also to ditches for hydraulic mining. Hand Gold Mining Co. v. Parker, 59 Ga. 419. While other states deny the right. Con. Chan. Co. v. C. P. R. R. Co. 51 Cal. 269. See *ante*, § 165, n. 1. The rule has been applied to drains, ditches, levees, etc., for improving wet and overflowed land, and is placed on grounds of general good, and welfare of the state, rather than doctrine of eminent domain, but it clearly belongs to the matter under discussion. Wurts v. Hoagland, 114 U. S. 610: "General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the tract in question, have long existed in the state of New Jersey, and have been sustained and acted on by her courts, under the constitution of 1776, as well as under that of 1844. Stats. December 23, 1883, Wilson's Laws, 382, November 29, 1788, and November 24, 1792; Paterson's Laws, 84, 119; Jones v. Lore, Pennington, 1048; Doremus v. Smith, 1 Southard, 142; Westcott v. Garrison, 1 Halsted, 132; State v. Frank & Guisbert Creek Co. 2 J. S. Green, 301; State v. Newark, 3 Dutcher, 185, 194; Berdan v. Riser Drainage Co., cited 3 C. E. Green, 69; Coster v. Tide Water Co. 3 C. E. Green, 54, 68, 518, 531; State v. Blake, 6 Vroom, 208, and 7 Vroom, 442; Hoagland v. Wurts, 12 Vroom, 175, 179. In State v. Newark, 3 Dutcher,

vate, or by other officers or persons.[1] The power delegated will not be enlarged by doubtful construction, and the purposes for which the power is to be used should be specified; for it must be exercised only for such a purpose as public necessity requires, and the authority given will be limited thereto.[2] If the taking is one that embraces a public use, the

185, 194, the supreme court said: 'Laws for the drainage or embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed not under the taxing but the police power of the government.'" The promotion of public health is a reason for the exercise of the right of eminent domain, because it is a public use. "The legislation of the state in creating boards of health in cities, villages and towns, and vesting in them great, if not extreme and arbitrary, powers, shows this. There is scarcely any one object which has been the subject of more enactments than this, or as to which more power is given to officials over the citizen and his property, and by more summary proceedings." Matter of Ryers, 72 N. Y. 1; also, New Orleans Draining Co. 11 La. Ann. 338; Dingley v. Boston, 100 Mass. 554; Bancroft v. Cambridge, 126 Mass. 438. The construction of canals for irrigation is a public use. "A canal to conduct water for mining, irrigation, manufacturing, household and domestic use was held to be for public use." Cummings v. Peters, 56 Cal. 593. The right is expressly upheld in Lux v. Haggin, 69 Cal. 255. Only sufficient can be taken for the use for which it is condemned. Matter of Albany Street, 11 Wend. 149; Embury v. Conner, 3 N. Y. 511; S. C. 2 Sandf. 98; Matter of John & Cherry Streets, 19 Wend. 659; Bennett v. Boyle, 40 Barb. 551; Dunn v. City Council of Charleston, Harper (S. C.), 189; Gregg v. Baltimore, 56 Md. 256.

[1] 2 Dillon, Mun. Corp. (4th ed.) sec. 602: "Thus a municipal corporation may be constitutionally invested with the power to open and establish, by compulsory acquisition or by purchase, such streets or parks as its council may judge to be expedient or necessary." West Chicago Park Com. v. West. Union Tel. Co. 103 Ill. 33; Cherokee v. Sioux City & I. F. Town Lot Co. 52 Iowa, 279; West River Bridge Co. v. Dix, 6 How. 507; Mercer v. P., F. W. & C. R. R. Co. 36 Pa. St. 99; Harbeck v. Toledo, 11 Ohio St. 219; Shaffner v. St. Louis, 31 Mo. 264; Scudder v. Trenton Del. Falls Co. 1 Saxt. (N. J.) 694; People v. Smith, 21 N. Y. 595.

[2] 2 Dillon, Mun. Corp. sec. 602, note: "As the right of eminent domain appertains to sovereignty, the legislature has no power to make a grant in restraint of it. Such a grant is not binding upon the state, and, even where it has been relied upon, the state may resume its sovereign right without violating the inhibition of the federal constitution against impairing the obligation of contracts. Hyde Park v. Oakwoods Cem. Assoc. 119 Ill. 141. General power to lay out streets held not to authorize the condemnation of the lands of a cemetery association. Cemetery Assoc. v. New Haven, 43 Conn. 234; S. C. 21 Am. Rep. 643, and note. The expediency of exercising the power

legislature is the judge of the necessity for the taking by the exercise of the power; but this is only true in a sense. The public use must be such a one that it might reasonably require the exercise of the power. The right given must also be con-

usually given to open streets is generally left solely to the judgment of the governing body of the corporation, and its judgment, when rightfully exercised, is not subject to judicial revision. Methodist Prot. Church v. Baltimore, 6 Gill, 391; Curry v. Mt. Sterling, 15 Ill. 320. Power may be delegated to local authorities to determine the expediency of building a bridge over a creek. Com. v. Charlestown, 1 Pick. 180. Streets may be established by direct action of the legislature, as by ordering a survey of a town to be made, and declaring the map to be a public record. Such streets are public highways without being formally opened or used. West v. Blake, 4 Blackf. 234. The law must provide a method of condemning streets before they can be opened and local assessments made. State v. West Hoboken Tp. 37 N. J. L. 77." Kane v. Baltimore, 15 Md. 240. In proceedings to open streets the costs thereof cannot, unless the right to do so be expressly or plainly given by the statute, be added to the damages and collected from the owners of the adjacent property. The words, "the expenses of said improvement," do not embrace the costs of the proceedings. In the absence of authority to collect the same from the adjacent owners, the costs must be borne by the corporation. Morris v. Chicago, 11 Ill. 650; S. P. Ill. & Mich. Canal Trs. v. Chicago, 12 Ill. 403. See Phillip Street, In re, 10 La. Ann. 313. See for rule in California, Sinton v. Ashbury, 41 Cal. 525; East St. Louis v. St. John, 47 Ill. 463. See West River Bridge Co. v. Dix, 6 How. 545, where the subject of eminent domain is ably examined. In the case last referred to the learned judge, in the course of his opinion, observes: "When we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without this power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Whoever heard of laws to condemn private property for public use, for a marine hospital or state prison. So a custom-house is a public use for the general government and a court-house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence, while as to a light-house, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents also for such seizures of private property abroad, for objects like the former, though some such doctrines appear to have been advanced in this country." See, also, Boston Mill Corp. v. Newman, 12 Pick. 476; Cooley, Const. Lim. 531, 533; Dunn v. Charleston, Harper (S. C.), Law, 189; Bankhead v. Brown, 25 Iowa, 540; Eldridge v. Smith, 34 Vt. 484; Wild v. Deig, 43 Ind. 455; 13 Am. Rep. 399.

fined to the necessity; for if only an easement is needed the power to condemn will be limited accordingly.[1] Power to condemn must be expressly given; the right must clearly appear from the statute itself.[2] While the legislature may delegate, or rather select, its agencies for the exercise of the power, the purchaser under an execution, the lessee, or grantee,

[1] Edgerton v. Huff, 26 Ind. 35. See and compare Water-works Co. v. Burkhart, 41 Ind. 364; Heyneman v. Blake, 19 Cal. 579; Kane v. Baltimore, 15 Md. 240; Mills on Eminent Domain, sec. 49, and cases cited; also Lewis on Eminent Domain, sec. 238, many cases relating to the power; and first case in note above. When the use is public, the necessity or expedience of the appropriation of any particular property is not one under judicial control or cognizance. Boom Co. v. Patterson, 98 U. S. 403; Chicago & East. Ill. R. R. Co. v. Wiltse, 116 Ill. 449; County Court v. Griswold, 58 Mo. 175.

[2] Schmidt v. Densmore, 42 Mo. 225; Allen v. Jones, 47 Ind. 438; Butler v. Thomasville, 74 Ga. 570; Perry v. Wilson, 7 Mass. 393; Miami Coal Co. v. Wigton, 19 Ohio St. 560. Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150, 159: "In favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control. It must not be a necessity created by the company itself, for its own convenience, or for the sake of economy." For a case where the company was held estopped to deny power to condemn, see Parsons Water Co. v. Knapp, 33 Kan. 752. If the power can be exercised without condemnation, the right to condemn will not be presumed. Leeds v. Richmond, 102 Ind. 372. Chamberlain v. Elizabethport Co. 41 N. J. Eq. 45: "The defendants insist that under that provision of the charter the city has authority to grant the right to lay in the street the tracks of railroads to be operated by steam. But the charter makes no provision for compensation to the owners of the land upon which the railroads may be laid. Hence it is to be presumed that the legislature did not intend to give authority to the city to exercise the right of eminent domain. Carson v. Coleman, 3 Stockt. 106; Boston & Lowell R. R. Corp. v. Salem & Lowell R. R. Co. 2 Gray, 1; Mills on Em. Domain, sec. 128. The legislature itself has no power to take private land for public use without providing for compensation." The authority to construct booms or bridges does not carry with it the power to condemn. Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 323; Perry v. Wilson, *supra;* Stevens Point Boom Co. v. Reilly, 44 Wis. 295; Thacher v. Dartmouth Bridge Co. 18 Pick. 501. But where power was given to construct a bridge, coupled with a provision for the ascertainment of damages for property taken therefor, the right to condemn was held to be necessarily implied. Linton v. Sharpsburg Bridge Co. 1 Grant's Cases, 414; Chamberlain v. Elizabethport Steam Cordage Co. 41 N. J. Eq. 43; Chaffee's Appeal, 56 Mich. 244; People v. Rochester, 50 N. Y. 525; Houghton v. Huron Copper Co. 57 Mich. 547; Bowler v. Drain Com'r, 47 Mich. 154.

of a corporation authorized to exercise the power, cannot exercise it; for the right belongs only to the one on whom it is conferred.[1] The legislature may alter or change the manner or mode of condemnation, or the tribunal to assess damages, or transfer the jurisdiction from one tribunal or court to another, or grant the right of appeal where none existed.[2]

§ 169. Statutory directions must be strictly pursued.— The authority given to persons or corporations to take private property for public use must be strictly pursued; the use for which it is to be taken must be clearly specified; the power, with all the conditions, limitations and directions for its exercise, must be closely and accurately followed. Such power is a very extraordinary one, based only on absolute necessity and the public good. Justice requires that its exercise shall be according to the mode pointed out by statute, and be inflexibly adhered to in all particulars.[3] If the course pursued

[1] Worcester v. Norwich R. R. Co. 109 Mass. 103; Eastern R. R. Co. v. Boston, etc. R. R. Co. 111 Mass. 125. But see Hinde v. Wab. Nav. Co. 15 Ill. 72; Vt. Cent. R. R. Co. v. Baxter, 22 Vt. 365. But in the last case the right was given to engineers, agents or servants. The railroad company having the right to condemn may do so to aid a contractor and for his benefit. Ten Broeck v. Sherrill, 71 N. Y. 276.

[2] Lewis on Eminent Domain, sec. 245: "It is no part of the contract between the state and a corporation vested with the power of eminent domain that the mode of condemning property shall remain unchanged. Long's Appeal, 87 Pa. St. 114; Miss. R. R. Co. v. McDonald, 12 Heisk. 54; Springfield, etc. R. R. Co. v. Hall, 67 Ill. 99; McCrea v. Port Royal R. R. Co. 3 S. C. 381; Gowen v. Penobscot R. R. Co. 44 Me. 140; Balt. & Susquehanna R. R. Co. v. Nesbit, 10 How. 395; Bohlman v. Green Bay & Minn. Ry. Co. 40 Wis. 157. Consequently the tribunal to assess damages may be changed (Chesapeake & Ohio R. R. Co. v. Patton, 9 W. Va. 648); jurisdiction may be transferred from one court to another (United R. R. Cos. v. Weldon, 47 N. J. L. 59); and a right of appeal may be granted where none existed before. Farnum's Petition, 51 N. H. 376; Long's Appeal, 87 Pa. St. 114. These and like matters relate to the remedy which, according to well settled principles, may be changed without impairing existing contracts, provided no substantial right secured by the contract is impaired. The substantial right in the case under consideration is the right to take private property by compulsory proceedings."

[3] Helena v. Harvey, 6 Mont. 114; Lance's Appeal, 55 Pa. St. 16; Godchaux v. Carpenter, 19 Nev. 415; Northern Pa. Term. Co. v. Portland, 14 Oreg. 24; St. Louis v. Gleason, 93 Mo. 33; Buffalo, In re, 78 N. Y. 362; S. P. R. R. Co. v. Wilson, 49 Cal. 396; Harbeck v. Toledo, 11 O. St. 219; State v. Jersey City, 26 N. J. L. 444; Nichols v. Bridgeport, 23 Conn. 189; Ben-

is defective in any jurisdictional requisites, the entire proceedings will be void. If simply irregular, they will be reversed on *certiorari*.[1] If the statute imposes precedent conditions upon the exercise of the power they must be strictly complied with.[2] The words "to," "from," "near," or "at" a place, in

nett v. Buffalo, 17 N. Y. 383; B. & O. R. R. Co. v. Boyd, 63 Md. 325; Lewis on Eminent Domain, § 253, and many cases. In § 254 Mr. Lewis says: "All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other. 'An act of this sort,' says Bland, J., 'deserves no favor; to construe it liberally would be sinning against the rights of property.' But, as in other cases, such a construction will, if possible, be given to an act as will carry into effect the chief and manifest purpose for which it was passed. It will also be construed so as to support its validity rather than otherwise."

[1] Harbeck v. Toledo, 11 O. St. 219; Shaffner v. St. Louis, 31 Mo. 264; Welker v. Potter, 18 O. St. 85. N. Y. Cable Co. v. Mayor of N. Y. 104 N. Y. 43: "In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where it is sought to take the property of an individual, under powers granted by an act of the legislature to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted by the legislature be strictly pursued, and all the prescribed conditions be performed. Where the power is conferred upon a corporation, duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a cause of forfeiture of its rights and franchise, for it rests with the state to determine whether such forfeiture will be enforced. Judicial proceedings are necessary to enforce such a forfeiture and it may be waived. That was the point to which the opinion in the matter of the Brooklyn, etc. R. R. Co. 72 N. Y. 245, cited by the appellant, was directed. It was assumed that this distinction was well understood, and a considerable portion of the opinion of this court in the present case was devoted to showing that the omissions and defects in the organization of the company were failures to comply with the conditions precedent to the existence of the petitioner as a corporation, and the exercise by it of the right of eminent domain, instead of being mere causes of forfeiture of rights acquired."

[2] Statutes authorizing drainage of one man's land across that of another do not mean on another's land; the water must go to a lake, water-house or pond, so as not to do harm (McLaughlin v. Sandusky, 17 Neb. 110), and not to a pond increasing its volume. Sherman v. Tobey, 3 Allen, 7. So the power to lay a private road must be followed strictly. See Killbuck Private Road, 77 Pa. St. 39; Klicker v. Guilbaud, 47 N. J. L. 277; Com. of Bibb Co. v. Harris, 71 Ga. 250; Lyon v.

statutes describing the termination and location of a railroad, must receive a reasonable construction; they have uniformly been construed to mean inclusive. If to a town, the statute is not fulfilled by its terminating at an addition thereto afterward laid out.[1] The power to exercise the right is a contin-

Hamor, 73 Me. 56, case concerning a private way, where the officers were personally interested; held disqualified to act. Power to lay a highway means not the shortest way or line. State v. Stackhouse, 14 S. C. 417. Power to lay a double track means on the same right of way. People v. N. Y. & H. R. R. Co. 45 Barb. 73. But land may be condemned to swing a bridge over a canal. Matter of N. Y. etc. R. R. Co. 33 Hun, 148. And to carry a highway over a road. State v. St. P. etc. R. R. Co. 35 Minn. 131. See, also, Amoskeag Mfg. Co. v. Worcester, 60 N. H. 522. Power to regulate streets does not confer power to open them. Knowles v. Muscatine, 20 Iowa, 248. For particular cases, see Lewis on Eminent Domain, sec. 256.

[1] Commonwealth v. Erie & North East R. R. Co. 27 Pa. St. 339; Pontchartrain R. R. Co. v. La Fayette & Pontchartrain R. R. Co. 10 La. Ann. 741; Chope v. Detroit & Howell Plank Road Co. 37 Mich. 195. But the word "at" has been held satisfied if one and one-half miles away. Parke's Appeal, 64 Pa. St. 137. See Fall River, etc. Co. v. Old Colony, etc. R. R. Co. 5 Allen, 221. Union Pac. R. R. Co. v. Hall, 91 U. S. 347: "In common understanding, therefore, a point on the western boundary of Iowa would be a point in Iowa on the eastern shore of the Missouri, precisely as a point on the eastern boundary of Nebraska would be understood to be in Nebraska on the western shore of the river. The words 'on the boundary of Iowa' are not technical words, and therefore they are to be taken as having been used by congress in their ordinary signification. Instances are not rare in which statutes have been construed, not literally, but in accordance with the common use of the language employed by the law-makers. Authority to construct a railroad or turnpike from A. to B., or beginning at A. and running to B., is held to confer authority to commence the road at some point within A., and to end it at some point within B. The words "from," "to" and "at" are taken inclusively, according to the subject-matter. 1 Mass. 126; 1 Stra. 179; Farmers' Turnpike v. Coventry, 10 Johns. 389. So in the case of the Mohawk Bridge Company v. The Utica & Schenectady R. R. Co. 6 Paige, 554, a similar ruling was made. The city of Schenectady was on the south bank of the Mohawk river, the north bounds of the city being the middle of the channel of the river; yet it was held that a railroad company authorized to build a railroad 'commencing at or near the city of Schenectady and running thence on the north side of the Mohawk river' was by those words empowered to build a bridge over the Mohawk and commence their railroad at or within the city. These decisions bear some analogy to the construction given by the circuit court to the phrase 'on the western boundary of Iowa,' and that construction is the only one consistent with the paramount purpose manifested in the act of congress to provide for

uous one; it may be exercised a second time when an additional amount of land for right of way is needed for the operation of the road, or increased side-track facilities, new depot grounds, shops and other essentials become necessary.[1] One statute may be passed referring to another for the purpose of describing the manner in which the right may be exercised, as, for instance, in the same manner as property is condemned for the purpose of railways. In such cases it has been held that the proceedings for condemnation should be similar, as a matter of practice, so far as applicable.[2] It has also been held that the legislature may pass a curative act legalizing defective proceedings where vested rights are not interfered with; but such practice is not regarded as advisable.[3]

connections with the railroads of the states east of Nebraska territory — a purpose to which we have already referred. Unless the Iowa branch of the Union Pacific was intended to commence on the Iowa shore of the Missouri river, its connections with the Iowa railroads would have been impossible. Those roads could not be extended to the Nebraska shore, for the state of Iowa was without power to authorize the erection of a bridge over the river, or even the establishment of a ferry. We do not propose to enter upon a consideration of the question whether congress had power to authorize the construction of railroads within a state. It is not necessary for the present case. Even the appellants would shrink from denying the lawful existence of their bridge."

[1] Additional land for right of way: Peck v. N. A. & Chicago R. R. Co. 101 Ind. 366; C. & W. Ind. R. R. Co. v. Ill. Cent. R. R. Co. 113 Ill. 156. Terminal facilities: C. B. U. P. R. R. Co. v. A. T. & S. F. R. R. Co. 26 Kan. 669. For side tracks: P. W. & B. R. R. Co. v. Williams, 54 Pa. St. 103; Childs v. Cent. R. R. Co. of N. J. 33 N. J. L. 323. Shops: C. B. & Q. R. R. Co. v. Wilson, 17 Ill. 123; Fisher v. C. & Springfield R. R. Co. 104 Ill. 323; Virginia & Truckee R. R. Co. v. Lovejoy, 8 Nev. 100; Simpson v. Lancaster & Carlisle R. R. Co. 15 Sim. 580; Stamps v. Birmingham & Stour Valley R. R. Co. 2 Phillips, 673; Brown v. Philadelphia, W. & B. R. R. Co. 58 Md. 539.

[2] Phillips v. Co. Com. 122 Mass. 258; Lockwood v. Charleston, 114 Mass. 416.

[3] Pitkin v. Springfield, 112 Mass. 509; Spaulding v. Nourse, 143 Mass. 490; Burgett v. Norris, 25 O. St. 308. Mattingly v. District of Columbia, 97 U. S. 687: "Congress may legislate within the district respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may therefore cure irregularities and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights. Judge Cooley, in view of the authorities, asserts the following rule: 'If the thing wanting, or which failed to be done, and which constitutes the defect in the proceeding, is something the necessity for which the legislature might have dispensed with by prior statute,

§ 170. Notice of the proceedings, when necessary.— Whatever notice of the proceedings to take property for public use is required by the statute to be given is jurisdictional and must be given in the manner prescribed by it. Where such notice is not given, or if not given strictly in the manner provided, the proceedings are unauthorized and void. It is, however, competent for the legislature to provide for constructive notice unless the constitution prescribes another method.[1]

then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.' Cooley, Const. Lim. 371. This rule we think is accurately stated." The omission, to be affected by curative act, must be one of power to be supplied by subsequent act. Spaulding v. Nourse, *supra*.

[1] Lewis on Eminent Domain, ch. 15, where numerous authorities are cited. Birge v. C., M. & St. P. R. R. Co. 65 Iowa, 442: "An assessment, it appears, was made, and the only question presented is as to the sufficiency of the notice to bind this plaintiff. The notice given was a notice by publication, and the person who was the owner at that time was not specifically named therein. The defendant, however, insists that no notice was necessary, and that, besides, if it was, the notice was sufficient; for that, while it is true that the owner was not specifically named in the notice, he was otherwise described. The notice was in these words: 'To Kate Perry . . . and all other persons having any interest in or owning any of the following real estate,' etc. Kate Perry, it appears, was formerly the owner. Just prior to the commencement of the proceedings she sold and conveyed to one Conable, who afterwards conveyed to the plaintiff. The defendant, failing to discover the conveyance of Kate Perry, proceeded as if she still remained the owner. Whether it would be competent for the legislature to provide for the taking of land for a public improvement without notice to the owner, we need not determine. Our legislature has not so provided. It has, on the other hand, expressly prescribed a notice. Having done so, we must hold that a notice is necessary. The only question to be considered, then, is as to whether the notice in question was a notice to Conable, the plaintiff's grantor, and the owner at the time of the proceedings for condemnation. If it was a notice to him, it must have been by reason of its embracing the words: 'all other persons having any interest in, or owning any of, the following real estate.' As to whether it was sufficient depends upon the statute under which it was given. The words above quoted, as contained in the notice, are the words of the statute. Code, sec. 1247. But it also provides that the company shall 'name each person whose land is to be taken or affected.' It does not provide that it shall do so, so far as the persons are known, but the provision is unqualified. We cannot hold that the provision can be disregarded, or that a qualification can be ingrafted upon it by judicial construction. . . . A

The notice need not be to the world, if constructive, but to those only who are interested.[1] Notice by mail has been held sufficient where it was authorized by statute, and seven days'

cardinal rule of construction is that courts shall give force to every part of a statute or instrument, so far as they can do so consistently. If we adopt the construction which the company contends for in this case, we should hold virtually that it is immaterial whether the owner is named or not, providing some one is named. We should, as it seems to us, virtually nullify an express provision. . . . If we should adopt the construction contended for by the company, and hold that he is, it appears to us that an inducement would be offered to railroad companies to omit the name of the owner, and to name some third person or some fictitious person, that they might enjoy whatever advantage they could from the absence of the owner. In our opinion the proceedings in this case for condemnation were insufficient to bind Conable, and consequently they cannot be now set up against the plaintiff." Allard v. Gaston, 70 Iowa, 781: "The statute provides that the notice shall specify to what point the road shall be fully completed before the tax can be collected. Authority to vote and levy the tax rests upon a substantial compliance with the requirements of the statute in the performance of the conditions upon which the authority is granted. These are jurisdictional matters, and unless they be shown, there is an absence of authority to vote the tax, and an election held where jurisdiction is wanting to vote the tax is void. Absence of authority will affect the acts of all who are required to act in matters touching the tax. In such case the township trustees cannot legally order the election, and no tax voted can be levied or collected; that is, such acts as pertain to the tax are void. The correctness of this conclusion cannot be doubted." Wright v. Wilson, 95 Ind. 408; State v. Paterson, 36 N. J. L. 159; State v. Atlantic City, 34 N. J. L. 99; State v. Orange, 33 N. J. L. 49; Curran v. Shattuck, 24 Cal. 427; Barnes v. Fox, 61 Iowa, 18; State v. Anderson, 39 Iowa, 274; Crawford v. Com. of Elk Co. 32 Kan. 555; Neilsen v. Wakefield, 43 Mich. 434; Risley v. St. Louis, 34 Mo. 404; State v. Jersey City, 24 N. J. L. 662; Kean v. Asch, 27 N. J. Eq. 57. Requiring record to show proof of service. State v. Plainfield, 38 N. J. L. 95. See Dillon on Munic. Corp. (4th ed.) sec. 606, and notes.

[1] Mills on Em. Domain, § 98, and cases. St. Paul, M. & M. R. Co. v. Minneapolis, 35 Minn. 141, 145: "The plaintiff further complains that the notice of the condemnation proceedings, and the assessment of damages provided by the charter, and the only notice in fact given in this case, was by publication. It is certainly remarkable that in a matter so important to the interests of property holders the legislature should have made no further or more adequate provision in the charter for notice of the pendency of proceedings for the assessment of damages in this class of cases. But this was a question for the legislature, and we do not think the proceedings void because the notice provided was constructive, or by publication. The proceedings are *in rem*, and it is the rule generally recognized that in such cases the legislature may provide that the compensation due the owner of the lands taken may be ascertained upon constructive notice

time is sufficient to those within the jurisdiction.[1] The time and place of the meeting of commissioners, or where the proposed action is to take place, must be correctly stated; and naming the place as a village, without designating the particular place, is insufficient.[2] The purpose of the meeting of the

merely, as well as upon personal notice. 2 Dill. Mun. Corp. § 606, and cases; Cupp v. Com. 19 Ohio St. 173, 182; Owners, etc. v. Mayor, 15 Wend. 374; People v. Mayor, 4 N. Y. 419, 441; 55 Am. Dec. 266. This rule has frequently been acted on and adopted in the legislation of this state. In the case of ordinary highways provision is made (wisely, we think) for service upon occupants of lands proceeded against (Gen. St. 1878, ch. 13, sec. 35). But no distinction is otherwise made between residents and non-residents, whether the lands are vacant or occupied."

[1] Crane v. Camp, 12 Conn. 464; Trustees, etc. v. Salmond, 11 Me. 109.

[2] Logansport v. Pollard, 50 Ind. 151. The place of meeting must be described. Commissioners v. Hoblit, 19 Ill. App. 259. In re Johnson, 49 N. J. L. 381: "A *caveat* against recording the return having been filed, a rule to show cause why the return should not be set aside was entered, and evidence under the rule has been taken. Several reasons why the return should be set aside have been filed by the caveators, but it will not be necessary to consider more than one of them. The road act required that the surveyors of the highway, at the time named in the order of appointment, must meet at such place as the court shall direct. The act also requires that advertisements of the time and place of meeting of the surveyors shall be set up. The provisions of the statute in this regard must be strictly observed. The object is to give all persons interested an opportunity to appear before the surveyors of the highway, to object to the laying out of the road if they desire so to do. Land-owners whose premises it is proposed to take for the road are interested. So, also, is every tax-payer of a township through which the road is to pass, because not only the cost of making the road, but the assessment for land taken, is to be paid out of the township fund. All the tax-payers of a county are interested in the cost of a bridge which the road, if laid, may render necessary. All these are entitled to notice of the time and place of the meeting of the surveyors. The order and the notices set up should state a definite time and place. Unless this be done, the surveyors have no right to proceed, and if they do so and lay out the road, their action is nugatory, for want of notice is a radical error, and vitiates the whole proceeding. In this case the order of appointment directed the surveyors to meet at Port Republic, without designating any place in Port Republic. Whether Port Republic be a village, or town, or a district or country bearing that name, does not appear, but in either case some building, public or private, should have been designated as the place of meeting. The order of appointment served on each surveyor did not give them the requisite information as to the place of meeting. It might as well have directed them to meet in the township of Galloway or in the county of Atlantic, without designating the place."

commissioners, or other officers who are to meet, should be stated. It is not sufficient if notice is given of a meeting for some other purpose. In all cases the requirements of the statute must be complied with.[1] Notice to the owner or occupant has been held to mean both; and owner has also been held to mean mortgagee, tenant in possession, vendee in possession, or any person having an interest in the estate.[2]

§ 171. Sequestration without notice void.— Whether the statute provides that notice shall or shall not be given, the law requires that before a man can be deprived of his property for public use he must have notice of the intended appropriation and be given opportunity to protect his rights; and while there are, in two or three states, decisions in early cases seemingly in conflict with this rule, we think that we are correct in saying that the law is that there must be notice given in all cases of the intended exercise of the right of eminent domain.[3]

[1] Austin v. Allen, 6 Wis. 134; Fitchburg R. R. Co. v. Fitchburg, 121 Mass. 132; Specht v. Detroit, 20 Mich. 168; Babb v. Carver, 7 Wis. 124. If a particular description of the property is required it must be given. Matter of Orange St. 50 How. Pr. 244. A misdescription of location of a ditch in a notice was held fatal. Miller v. Graham, 17 Ohio St. 1. The point of termination of a highway should be stated in the notice, though not required to be given by statute. Matter of Highway, 16 N. J. L. 391; State v. Green, 18 N. J. L. 179. A notice stating a road was to run northerly between two named points by the most practical route was held insufficient. Potter v. Ames, 43 Cal. 75. Notice in road cases must show in what township the road proposed to be altered runs. Parkhurst v. Vanderveer, 48 N. J. L. 80; State v. Allen, 6 Halst. 103. As to indefinite description in notice, see State v. Elizabeth, 32 N. J. L. 357.

[2] Hagar v. Brainerd, 44 Vt. 294. Watson v. N. Y. Cent. R. R. Co. 47 N. Y. 161: "The terms 'owner or owners' as used in these statutes, being intended to designate the parties entitled to compensation which is substituted for the land taken, should be held to embrace all persons having estates in the land in possession, reversion or remainder. All persons having proprietary interests are entitled to compensation, for the aggregate of those interests constitute the ownership or fee." Mortgagee must have notice. Severin v. Cole, 38 Iowa, 463. Notice must name the person whose land is to be affected. Birge v. C., M. & St. P. R. R. Co. 65 Iowa, 440. See Cochran v. School Dist. 50 Iowa, 663.

[3] Neeld's Road, 1 Pa. St. 355: "The second exception is that the road was viewed and damages assessed without any notice to the guardian of Jesse Pearson, through whose land it passes, or to any person interested for him. The law abhors all *ex parte* proceedings without notice. Notice in this case to the owners of the property was absolutely necessary. To take a man's property and assess his damages without notice of it is

There can be no taking of property belonging to a citizen without notice, and it matters not whether the proceeding be *in rem* or *in personam;* every man must have an opportunity to be heard before his property is sequestrated; the taking of

repugnant to every principle of justice, and such a proceeding is utterly void." Road in South Abington, 109 Pa. St. 122: "But, as the appropriation of a man's property and the assessment of his damages, without notice, is repugnant to every principle of justice, it was held in a number of cases, under the act of 1836, notably in Neeld's Road, 1 Pa. St. 355, Boyer's Appeal, 1 Wr. 257, and Cent. R. R. Co.'s Appeal, 6 Out. 38, that notice to the property owner is absolutely essential to the validity of the view or assessment. But whether such notice was given or not is certainly a pure question of fact, and it has in numerous cases been held by this court that the decision upon it in the court below is final and therefore not the subject of review." See Lewis on Em. Domain, sec. 364, and numerous citations. Stuart v. Palmer, 74 N. Y. 190: "It must be conceded that property cannot be taken by the right of eminent domain without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard as to the compensation to be awarded him. An act of the legislature arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that due process of law which both the federal and state constitutions guaranty to every citizen. Can it be that when the public takes land for a public highway the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value without any opportunity on the part of the owners to be heard? The legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. . . . It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller, of the United States supreme court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decision may be founded.' Davidson v. New Orleans, 17 A. L. Journal, 223; S. C. 96 U. S. 97. It may, however, be stated generally that due process of law requires an orderly proceeding, adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this. In his

property for public use is a sequestration; the party owning or having an interest therein must be notified in some form. We have fully discussed this matter in the chapter on proceedings *in rem*, to which the reader is referred.[1]

§ 172. Necessity of notice — Time and manner of service — Waiver. — It is undoubtedly within the power of the legislature to provide that service of notice for the taking of private property for public use may be made by publication or posting on both residents and non-residents.[2] It has however, been held by high authority that, even where publication of notice is provided for, there should be personal service on those within the jurisdiction of the court or tribunal having the matter before it.[3] But much depends on circumstances, as

argument in the Dartmouth College Case (4 Wheat. 519) Webster defined 'due process of law' as a proceeding 'which proceeds upon inquiry and renders judgment only after trial.' Mr. Justice Edwards, in Westervelt v. Gregg, 12 N. Y. 209, defines it as follows: 'Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' Judge Cooley, in his work on Constitutional Limitations, at page 355, after saying that 'due process of law' is not confined to ordinary judicial proceedings, but extends to all cases where property is sought to be taken or interfered with, says that 'due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.' It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That 'due process of law' requires this has been quite uniformly recognized." Boonville v. Ormond's Adm'r, 26 Mo. 193; Davidson v. New Orleans, 96 U. S. 97.

[1] Cooley, Const. Lim. 403; Windsor v. McVeigh, 93 U. S. 274; Tracey v. Corse, 58 N. Y. 143; Woodruff v. Taylor, 20 Vt. 65; Baltimore & Ohio R. R. Co. v. Pittsburgh R. R. Co. 17 W. Va. at p. 840; Lewis on Eminent Domain, sec. 365.

[2] Wilson v. Hathaway, 42 Iowa, 176: "We have no doubt of the power of the legislature to provide for the condemnation of the right of way for public highways upon notice by publication in newspapers or by notices posted. The proceeding is in the nature of proceedings *in rem* in which the court acquires jurisdiction of the property which is the subject of the adjudication. See Melhop & Kingman v. Doane & Co. 31 Iowa, 397 and cases cited." Cupp v. Commissioners, 19 O. St. 173; Lewis on Eminent Domain, sec. 367, and cases cited; Matter of Empire City Bank, 18 N. Y. 215; State v. C., B. & Q. R. R. Co. 68 Iowa, 136.

[3] See Matter of Empire City Bank, 18 N. Y. 199. Mulligan v. Smith, 59 Cal. 230: "If he had no such notice, and no opportunity to be heard upon

well as the wording of the statute; for it seems unjust in many cases to require a party to search all newspapers, and examine all posted notices, where he is in possession of lands and present in the jurisdiction. We are, however, not to make law, but to state it as we find it. That the party interested may waive notice by appearing is undoubtedly the law, but the appearance must be in the case, and not merely to object to the want of notice.[1] The notice must be given to the parties, not

it, it is difficult to see how he can be concluded by an adjudication to which he was not a party and of which he had no notice. For it is a principle which underlies all forms of government by law, that a citizen shall not be deprived of life, liberty or property without due process of law. The legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time, place and tribunal, to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature. Weimer v. Bunbury, 20 Mich. 201." Kundinger v. Saginaw, 59 Mich. 355; State v. Fond du Lac, 42 Wis. 287. Examine Lent v. Tillson, 72 Cal. 404, giving a very proper rule.

[1] State v. Jersey City, 25 N. J. L. 309: "By virtue of the right of eminent domain, or inherent sovereign power, the legislature has the authority to take private property for public use, and for public uses only, subject to just compensation. When this power is delegated by the legislature to a municipal or other corporation, its exercise is subject to the inflexible rule that the power must be strictly pursued, and ordinarily it must appear to be so on the face of the proceedings (Rex v. Croke, 1 Cowper, 30; Vanwickle v. R. R. Co. 2 Green, 166); though perhaps, in the case of municipal corporations, it may be sufficient if it appear in that or some other way. This rule is applicable in the present case to the proceedings of the common council as well as to those of the commissioners. Both were acting under a special delegated power derived from the legislature. And the exercise of this power by the common council was in the nature of a judicial proceeding, and therefore clearly reviewable on *certiorari*. . . . The fifty-fifth section of the charter of Jersey City enacts that 'when any application shall be made for opening, altering or widening any street, etc., the common council shall appoint a time when persons interested therein may be heard before them, or the appropriate committee, on the merits of such application, and shall give notice of such application, and the time and place of hearing,' etc. Upon inspecting the proceedings it appears that, instead of appointing a time for the hearing, the common council simply directed the clerk 'to give the required notice for objections;' and it seems that he fixed upon the regular meeting of the common council, on the 2d of September ensuing, as the time, and gave notice accordingly. This omission on the part of council is objected to as error. Upon inspecting a copy of this notice

to their agents, tenants or other persons than the parties who are named in it.[1] Strict proof of service should be made where notice is given by posting or publication.[2] The particular manner of service should be stated. Notice of adjourned

given by the clerk, it appears to be a notice that, at the time and place mentioned, council would hear and consider any objections to said improvements that might be presented in writing. And it is further insisted that council had no power under the charter thus to limit the right to make objections. Now, in failing to appoint a time for hearing, the common council undoubtedly omitted to comply with one of the express directions of the charter; and in the notice that they would hear such objections as might be presented in writing only, for that is the effect of it, they clearly exceeded their authority. It may be that neither of these departures from the directions of the charter were calculated seriously to interfere with the rights of the property holders whose lands were to be taken, yet, in point of fact, the power delegated to the common council was not strictly pursued in these particulars, and their jurisdiction to pass the ordinance therefore fails. The appearance of Durant before the council at the time, and his presenting a written remonstrance, does not cure the difficulty, for he did it expressly reserving all legal objections." Bernard v. Brewer, 2 Wash. (Va.) 76. To the same effect, Hinckley et al., Petitioners, 15 Pick. 447. But if, on the return of the inquisition, the court had jurisdiction to quash the writ on the same grounds upon which it might have denied the application, then an appearance to contest the inquisition ought to be held a waiver of defective notice. Kansas City, etc. R. R. Co. v. Campbell, 62 Mo. 585. The taking of an appeal is a waiver. Atchison, etc. R. R. Co. v. Patch, 28 Kan. 470.

[1] Notice to husband not notice to wife. Watson v. Sewickley. 91 Pa. St. 330; Whitcher v. Benton, 48 N. H. 157. Notice to tenant for life not notice to reversionary owner. Chicago & Alton R. R. Co. v. Smith, 78 Ill. 96. Notice to special agent not notice to corporation. M., K. & C. R. R. Co. v. Parsons T. Co. 26 Kan. 503.

[2] State v. Otoe Co. 6 Neb. 129; Road in Sussex & Morris, 13 N. J. L. 157; Matter of Highway, 15 N. J. L. 39. Appeal of Cent. Railroad of New Jersey, 102 Pa. St. 40: "It is quite apparent from this recital that no inference of service of notice of the view under the second petition can be drawn from the general statement in the report, that five days' notice was given to the owners and occupants of the land through which the road passes, because the Central R. R. Co. of New Jersey is nowhere described as such owner or occupant. But if it were described as an owner or occupant no damages are assessed to it, and no release of damages from it is returned with the report. In this state of the record it is manifest that the proceedings are fatally defective and should have been set aside. The invalidity of such proceedings is fully established by the following cases: Neeld's Road, 1 Barr, 355; Boyers' Road, 1 Wr. 257; Road in Lancaster City, 18 P. F. S. 396; Road in Cogan House Township, 7 W. N. C. 257. An affidavit is returned with a copy of a notice of the view addressed to the appellant, in which the deponent, Valentine Mutchler, says that 'he served a true and cor-

meetings, where the day is not fixed, should be given; and so of any matter of which the party is not apprised by the notice originally given; but the party must take notice of regular adjournments of the tribunal as of any court.[1]

§ 173. Jurisdiction of the tribunal.— It is sometimes difficult to determine what tribunal has jurisdiction to act in the matter of taking and condemning property for public use; nice questions may arise as to the construction of the statute. A mistake in this respect is fatal to the proceedings. It is not infrequent that general authority is bestowed upon one tribunal to lay out roads and highways in the county, and the jurisdiction is conferred on the county court, board of su-

rect copy of the foregoing notice on the Cent. R. R. Co. of New Jersey.' But as the manner of service is entirely omitted from the affidavit, it is impossible to know whether the appellant was ever notified in any mode which the law can recognize. The deponent may have supposed that a service upon a track-walker or a laborer was sufficient and made his affidavit upon that theory. The mode of serving notices and process upon a corporation is designated by statute and must be pursued. In all returns of such service the manner of the service must appear so that the courts may judge of its sufficiency. The affidavit of service of the first view is still more defective. The deponent, Emanuel Ritter, states that he served a copy on 'Samuel Newmeyer for Lehigh & Susquehanna R. R. Co.' It does not appear that Samuel Newmeyer was an agent or any species of officer of the Lehigh & Susquehanna R. R. Co., or any other than a total stranger, and it is very certain that the corporation named is not the Cent. R. R. Co. of New Jersey. The act of 22d March, 1817, section 5 (1 Purd. Dig. 286, pl. 24), provides that 'all notices whatsoever may, when a corporation is a party in any suit, be served on the president or other principal officer or cashier or secretary or chief clerk of such corporation.' Whether this act or the act of March 21, 1849, be applicable, the service must be upon some person who is a representative of the corporation, designated in the act, and that fact must appear in the return of affidavit of service. This record fails entirely to show any such service, and therefore does not disclose that the Cent. R. R. Co. of New Jersey had any notice of either the first or second view or of any assessment of damages, and this defect is fatal." Proof of service by affidavit, see Carr v. Fayette Co. 37 Iowa, 608; Scott v. Brackett, 89 Ind. 413. Want of notice can only be taken advantage of by the interested party or privy not served. Knox v. Epsom, 56 N. H. 14; Ives v. East Haven, 48 Conn. 272.

[1] State v. Plainfield, 41 N. J. L. 138; St. Louis v. Gleason, 15 Mo. App. 25. See Thorndyke v. Co. Com. 117 Mass. 566. The following are cases in which notice of certain steps in the proceedings was held necessary: Matter of Exchange Alley, 4 La. Ann. 4; New Orleans, etc. R. R. Co. v. Bougere, 23 La. Ann. 803; Com. v. Cambridge, 7 Mass. 158; Shaffner v. St. Louis, 31 Mo. 264.

pervisors, highway commissioners, and the like; and afterward the legislature, without repealing the statute giving the power to those bodies, gives power to city authorities to control streets, alleys and bridges within the city, and vests them with authority to establish and lay out streets, and also to condemn property. By bestowing power on the city council or other lawfully constituted tribunal for such purposes, the question may arise whether the authority given to the county court, supervisors or other body having general power to establish roads and highways within the county continues so as to authorize such court or body to establish streets in the town or city. In such cases the rule has not been uniform; some courts holding that each body has concurrent jurisdiction, while others hold the general power granted to the county is hostile to the interest of the cities and is limited by the subsequent statutes to territory not within the city limits.[1]

[1] Gallaher v. Head, 72 Iowa, 173 (Seevers, J.): "It is conceded that the plaintiff owned certain real estate within the corporate limits of the incorporated town of Jefferson which had not been laid out into blocks and lots, and had not been platted and recorded as such, but was used for agricultural purposes. It is assumed by counsel, and we infer it to be true, that no streets or alleys had been laid out over the plaintiff's land. The question, therefore, is fairly presented whether, under the statutes of this state, the board of supervisors are authorized to establish highways over territory within the limits of an incorporated town. The authorities bearing on this subject are not in accord, because of differences in the statute or in the constructions thereof. It has been held in the following cases that counties, or what is equivalent thereto, have the requisite power and jurisdiction over such territory: Wells v. McLaughlin, 17 Ohio, 99; Baldwin v. Green, 10 Mo. 410; Butnam v. Fowler, 17 Ohio, 101; Bennington v. Smith, 29 Vt. 254. The contrary has been held in the following cases: State v. Jones, 18 Tex. 874; Indianapolis v. Croas, 7 Ind. 9; Ottawa v. Walker, 21 Ill. 605; Cross v. Mayor of Morristown, 18 N. J. Eq. 305. Boards of supervisors have the power and authority to establish highways. Code, sec. 920. This general grant of power is not, in terms, restricted to territory not within an incorporated town or city. Cities and incorporated towns have also the power to 'lay off, widen, straighten, narrow, vacate, extend and establish' streets and alleys. Code, sec. 464. Such power is limited to territory within the corporate limits. If boards of supervisors have the power to establish highways over the same territory, then they and cities and towns have the same power. This clearly is not desirable, and we think was not contemplated. This fairly appears when the several provisions of the statute bearing upon the question are considered. When the board of supervisors establish a highway, it is the duty of the auditor to notify the township clerk of such fact, whose

We think that the rule is that the board of supervisors or county commissioners have no jurisdiction to establish roads within cities or incorporated towns.

§ 174. What may be taken.—It has been said that all kinds of property, irrespective of the degree or kind of interest the citizen may have in it, may be taken for public use; but surely there should be some description of property in its enlarged sense that cannot be taken, such as moneys, securi-

duty it is to notify the highway supervisor to have the same opened and worked. Code, sec. 949. Such supervisor has no authority to open or work a highway within the corporate limits of a city or town. The street commissioner of the corporation, however, has such authority. And although the territory in question may not have been taxable for general municipal purposes, because it was used for the purpose of agriculture, yet it is taxable by the corporation for highway purposes. Ch. 158, Acts 19th General Assembly. There is a clear and recognized distinction between streets and highways in cities and incorporated towns and unincorporated towns. The latter are deemed to be a part of the highways of the county, and are regarded as being under the power and jurisdiction, for all purposes, of county and township officers, while the former are subject to the exclusive control of the officers of the municipality. Code, secs. 952, 953. It is also true that cities and incorporated towns have the control of all territory within the corporate limits, to abate nuisances, regulate fast driving on streets and highways therein, to authorize or forbid the laying down of railway tracks over the streets and highways, to license exhibitions thereon, and many other things of like character. It seems to us that, when the several powers so conferred on municipal corporations are considered, the jurisdiction and power of such corporations over territory within the corporate limits must be regarded as exclusive for the purpose of establishing highways or streets on or through such territory. While it has not been directly so decided, we think in principle it has been so held. Public bridges are a part of a highway. Code, sec. 45, subd. 5. And in McCullom v. Black Hawk Co. 21 Iowa, 409, it was held that a county was not liable for an injury caused by a defective bridge within the corporate limits of a city, although the highway had been established and the bridge constructed and maintained for many years by the county prior to the incorporation of the city. So in Clark v. Town of Epworth, 56 Iowa, 462, it was held the town had full control of the streets, and that it could not escape liability for an injury caused by the unsafe condition thereof on the ground that they were put in such condition by the supervisor of the highway district. We cannot think it was contemplated that both counties and cities should have concurrent jurisdiction over such territory for the purpose of establishing highways, for the reason that it is quite clear that the jurisdiction and liability of the counties would cease immediately upon the establishment of the highway and all the burden of maintaining it be cast on the municipality."

ties and evidence of debts, and property of that class. There are decisions where expressions are used by the courts which indicate that money can be taken and appropriated. We, however, believe that such expressions are no more than *dicta*.[1]

[1] Hammett v. Philadelphia, 65 Pa. St. 152: "Private property taken for public use by right of eminent domain is taken, not as the owner's share or contribution to a public burthen, but as so much beyond his share. The People ex rel. Griffin v. Brooklyn, 4 Comst. 419. It has been said by Judge Field, of California, now on the bench of the supreme court of the United States, that 'money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of the compensation in money itself; and the general doctrine of the authorities of the present day is, that the compensation must be made, or a fund provided for it in advance.' Burnett v. Sacramento, 12 Cal. 76. I am not able, and do not feel disposed, to enter the lists upon such a question, but it does seem to me that there may be occasions in which money may be taken by the state in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations or individuals. The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge Ruggles confines the right to exact money by virtue of the eminent domain to the case where it is for the use of the state at large in time of war. The People ex rel. Griffin v. Brooklyn, *supra*. I cannot see that there is any such necessary limitation. The public necessity which gives rise to it prevents its being restrained by any limitations as to either subject or occasion. In truth it matters not whether an assessment upon an individual or a class of individuals for a general, and not a mere local, purpose, be regarded as an act of confiscation — a judicial sentence or rescript, or a taking of private property for public use without compensation — in any aspect, it transcends the power of the legislature and is void. I regard it as a forced contribution. If the sovereign breaks open the strong-box of an individual or a corporation and takes out money, or if, not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use." See People v. Brooklyn, 4 N. Y. 419; Burnett v. Sacramento, 12 Cal. 76. It has been said in Alabama, A. & F. R. R. Co. v. Kenney, 39 Ala. 307: "All property is held subject to an inherent right in government to appropriate it to public use when public good may require it to be done." Met. City R. R. Co. v. Chi. W. D. R. R. Co. 87 Ill. 324: "Property, in its broadest and most comprehensive sense, includes all rights and interest in real and personal property, and also in easements, franchises and incorporeal hereditaments. That which may be taken for public uses is not exclusively tangible property. The right of emi-

Money may be taken by way of taxation, but it is not property subject to condemnation for the use of the public. The very principle upon which the power rests is the need of property by reason of the necessity for the particular use, and

nent domain is an attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power and may be seized and appropriated to public uses when necessity demands it. If it shall be conceded the right claimed by defendant, under its contract with the common council, could be classed as a franchise, which it cannot, it is, nevertheless, a right in the nature of property, within the sense that term is used in the law, and no reason is perceived why it could not be condemned to the use of the public. It is true it is corporate property, but it is not used or employed for the benefit or in the service of the public. It is held and claimed exclusively for private gain, and as being beyond the reach of the extraordinary power of eminent domain. No principle is better settled than that all mere private interests are subordinate to the public welfare. We are aware of no policy of the law that forbids the taking of such property for public uses, nor is it forbidden by any limitations imposed by the constitution. Other courts and law writers have given expression to views, to which we may refer as clear expositions of the law on this subject, and as illustrating in some measure the case in hand. B. & L. R. R. Co. v. S. & L. R. R. Co. 2 Gray, 1; Cooley's Const. Lim. 281. Counsel cite with great confidence the case of Cen. City Horse R. R. Co. v. Ft. Clark R. R. Co. 81 Ill. 523, as declaring principles that must control the decision of the case at bar. In that case it is stated with entire accuracy the limitations that must be understood to exist to the comprehensive powers conferred by the act in relation to 'Horse and Dummy Railways' or corporations organized for the construction of such roads, in regard to the exercise of the power of eminent domain for the purpose of their organizations. An examination of that act, it is said, shows that private property, not property used and occupied by the public, was alone in the contemplation of the legislature when the act was passed. Reference was made to the case of Peoria, Pekin & Jacksonville R. R. Co. v. Peoria & Springfield R. R. Co. 66 Ill. 174, being the only case in which this court had previously spoken on this subject, as declaring principles that lead to the same conclusion. The decision is placed on the distinct ground that the property sought to be condemned was already in the use and occupation of the public, and the taking of the road would effectually destroy the usefulness of that which remained. But that is not the case here. There is no pretense the property sought to be condemned in this case was, or is, in the use and occupation of the public, nor that the taking of it could by any possibility impair the usefulness of defendant's road, located as it is, on another street. Such a claim would be preposterous. The ultimate effect of locating petitioner's road upon a parallel street might be to lessen the tolls defendant would receive, but for such an injury compensation could be made. Our conclusion is, that in any view that can be taken, conceding, as the petition does, de-

the taking of money, or property of the character of money, would be simply confiscation. Property can only be taken upon making just compensation, and money is compensation. Money is obtained by taxation for revenue purposes, and the

fendant has some interest in Lake and Canal streets, that interest is in the nature of property, and is subject, not being in the actual use or occupation of the public, to be condemned to public use by petitioner, under the laws of the state." It will be seen in this case that the question in dispute related to an easement and a franchise in the nature of a chattel real. The case of N. Y. H. & N. R. R. Co. v. Boston, H. & E. R. R. Co. 36 Conn. 198, lays down the following: "It is to be observed that the respondents do not take the petitioners' franchise; they simply propose to run their track over land already taken for railroad purposes by the petitioners, but in such a manner as not to interfere with the petitioners' track as now used, except at the crossing, which is not objected to, and not to subject them to any considerable inconvenience, unless and until a double track is required for the business of the road. The question then is not whether the respondents have power under their charter to take the petitioners' road for their own use and practically destroy their franchise, but whether any part of the land once taken by the petitioners as a site for a railroad, and which is not required for present use, may be again taken by the respondents for similar purposes. It will hardly be claimed that the taking of property by the exercise of the right of eminent domain is an exhaustion of the right in respect to that property. Strictly speaking there is no such thing as an extinction of the right of eminent domain. If the public good requires it, all kinds of property are alike subject to it, as well that which is held under it as that which is not. Even contracts and legislative grants, which are beyond the reach of ordinary legislation, are not exempt. West River Bridge Co. v. Dix, 6 How. 507; Richmond & F. R. R. Co. v. Louisa R. R. Co. 13 How. 71; Enfield Toll Bridge Co. v. H. & N. H. R. R. Co. 17 Conn. 454. But the power of the legislature in the premises is substantially conceded. It is insisted, however, that that power has not been delegated to the respondents. It must be conceded, I think, that the respondents are not authorized to take the petitioners' franchise. The charters of both corporations exist and are in full force at the same time. The legislature intended to authorize the construction of both roads. It cannot be presumed, therefore, that it was intended that either should have power practically to destroy the other. But it does not follow that the lay-outs of the two roads may not, to some extent, cover the same ground. There is nothing in the charter of either company which prohibits this. On the contrary the charter of the New York & H. R. R. Co. (4 Private Acts, p. 1016), the powers granted by which are now vested in the respondents, expressly authorizes the company, whenever necessary to intersect or cross any other railroad, to build their own road 'across or upon' the same, upon restoring it to its former state or in sufficient manner not to impair its usefulness." This case only shows that the franchise of another road should not be destroyed, but that a portion of the right of way not in

power of taxation is ample; but neither money nor choses in action come within the reason of the rule requiring the appropriation of property for public use, nor within the law of necessity. I find no case wherein such rule has been applied,

use might be condemned. The case of Eastern R. R. Co. v. Boston & Maine R. R. Co. 111 Mass. 130, is similar to the last case, and where an appropriation of an easement over the right of way of another road was sought the property claimed was realty, and right secured by franchise. Its taking did not destroy the franchise of another road. The right pertained to realty. "The authority of the legislature to grant these privileges to the Eastern Railroad Company is denied on constitutional grounds. It is said that the land in question has already been appropriated to a public use under the provisions of law, and that in the exercise of the right of eminent domain the state cannot legally give to one railroad corporation power to take from another the exclusive use of land to be devoted to identically the same public use; that this would be to destroy vested rights and impair the contract contained in its charter. But it has been often declared by this court that there is no such limitation on the authority of the legislature. The power of the state to take private property for the public use reaches every description of property within its jurisdiction, even when acquired by grant from the state. It is an inherent element of sovereignty; and from the necessity of the case, and the highest considerations of public welfare, it must continue unimpaired in the state. It is impliedly reserved in every grant. It cannot be abridged so as to bind future legislation. The franchise of a corporation is not exempt. As an incorporeal hereditament, it may be taken, in whole or in part, and with the other property of the corporation devoted to other or similar public uses. The purposes of government would be so far defeated, if any single owner, corporation, or individual, could in this respect control its action. It belongs exclusively to the legislature to determine whether the public benefit to be secured is sufficient to warrant the taking, and this is not a judicial question. The necessity may be left to the adjudication of designated officers or tribunals; but when not so delegated, it may be declared by the legislature itself. The right itself may be delegated to corporate bodies, public or private, and when the enjoyment of two public rights would to some extent interfere, it is, in the language of Chief Justice Shaw, 'for the legislature to determine which shall yield, and to what extent, and whether wholly or in part only, to the owner, and such question will ordinarily be determined by the legislature according to their conviction of the greater preponderance of public necessity and convenience.' Com. v. Essex Co. 13 Gray, 239, 247; Boston Water Power Co. v. Boston & Worcester R. R. Co. 23 Pick. 360; Boston & L. R. R. Co. v. Salem & L. R. R. Co. 2 Gray, 1; Cent. Br. Co. v. Lowell, 4 Gray, 474; Hingham & Q. Br. Co. v. County of Norfolk, 6 Allen, 353, 360; Haverhill Br. v. County Com. 103 Mass. 120. See, also, New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co. 36 Conn. 196; White River Turnpike Co. v. Vt. Cent. R. R. Co. 21 Vt. 590; People v. Smith, 21 N. Y. 595, 598."

and need not discuss the question further. The law rests on necessity in one respect, and is more commonly applied to real property, but may relate to personal property as well. There are few cases of that character, because the necessity does not arise except in rare instances, for the exercise of the power.[1] The construction of a street, a railway or canal requires the exercise of the power and so may a park in a city. The reason for the rule is obvious.

§ 175. Rests on theory that owner will not sell.—It will be seen from what has been said in the preceding section that property which is subject to the exercise of the power of eminent domain is such as cannot, ordinarily, be acquired by purchase. The necessities of the public, being of superior importance to the individual's supposed interests or desires, require that it shall be transferred and devoted to another purpose. Hence, the state lends its aid, and compels the owner to relinquish his title or interest for such compensation as may be awarded him pursuant to law. That interest may be either corporeal or incorporeal. It does not matter who is the owner; whether an infant, a corporation or the United States. Hence, public land situated within a state may be taken if it has not been already devoted to use for an equally public purpose.[2] Where such lands have been devoted to particular governmental purposes, as for an armory or public buildings, the rule is different.[3] Such property can-

[1] See last note.

[2] United States v. Railroad Bridge Co. 6 McLean, 517; Hendricks v. Johnson, 6 Porter, 472.

[3] United States v. Chicago, 7 How. 192: "To proceed to a consideration of the principal matter involved in these questions, it will be necessary first to advert briefly to some of the admitted facts in the case. The United States became the owners of the land occupied by Fort Dearborn, near Chicago, in the state of Illinois, under the original cession of the Northwest Territory. It was occasionally a station for troops from 1804 to 1824, when the whole fractional quarter-section on which the fort stood was reserved by the general land-office for military purposes, on the application of the secretary of war. See Wilcox v. Jackson, 13 Pet. 502. In that case, which is better known as the Beaubean claim, this court decided that this was a legal appropriation of that quarter-section of land to a public purpose, and exempted it from the rules as to the mass of the public lands and their usual liabilities. From that time till A. D. 1839 it was occasionally occupied as a fort by the United States, and a light-house was erected on it under the authority of congress, when

not be appropriated. It matters not from whence the party derived his title, for all titles were originally vested in the state, and the right of eminent domain is one of the reserved

the secretary of war, thinking that a portion of the same might be sold without injury to the public interests, proceeded, with the approbation of the president, to make such a sale under the act of March 3, 1819 (3 Stats. at Large, 520). He did this by an agent, who first made a plan of the whole quarter-section, calling it 'Fort Dearborn addition to Chicago' and laying it out in lots, without exhibiting on it any buildings or reservations. But he did not sell the whole, the government not then concluding to part with the fort, or land and buildings immediately contiguous. On that plan certain streets were laid down running into the whole quarter-section. The sales, however, being made of only the lots and land outside of what was reserved, the United States allowed the proposed streets only so far as there laid down to be opened by the city of Chicago, and used by the adjoining owners, in conformity to the plan. And when the city undertook to open the streets within the line of reservation, and where no sales of land had been made, and where opening them would prostrate some of the public buildings, and materially injure and impair the public uses of the station, the United States applied for the injunction before named." The questions certified are: . . . "Whether the corporate powers of the city of Chicago have a right to open the streets through that part of the ground laid out in lots and streets but not sold by the government. Whether the corporate powers of the city are not limited to that part of the city which, by sale of the government, has become private property. Whether the streets laid out and dedicated to public use by Birchard were not, by his surveying the land into lots and streets, making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby made the ground embraced by said streets 'private property,' so as to authorize said city of Chicago to keep said streets open. But as has been explained, the whole of them in substance depend upon the extent and character of the rights of the United States in the place where the new streets were proposed to be opened. What, then, were those rights? 1. The place was where the title of the government had never been parted with after the original cession. 2. It was where the land had been appropriated and legally set apart for a special public use. 3. It was where the opening of these streets would essentially impair, if not destroy, the public use. 4. It was where streets had never been opened and used, or actually dedicated in that way to purchasers of land there, or to the community in that neighborhood. 5. It was where the city charter, by its act of incorporation, did not extend, as the charter expressly excepted from its limits 'the southwest fractional quarter of section 10, occupied as a military post, till the same shall become private property.' Now, though this court possesses a strong disposition to sustain rights of the states, and local authorities claiming under them, when clearly not ceded, or when clearly reserved, yet it is equally our duty to support the general government in the exercise of all which is plainly granted to it, and is necessary for the efficient discharge of the great powers

rights of sovereignty and may be exercised at its pleasure.[1] So, lands devoted to colleges and academies have been held to be subject to the exercise of the power.[2] Where they have

intrusted to it by the people and the states. The erection of forts belongs to one of those powers, and the building and employment of light-houses belongs to another. Under the circumstances of this case just recited, then, very clear facts or principles must exist, which impair the rights of the United States, before streets can be opened upon their soil, when situated, reserved, and used as this is. It is not questioned that land within a state purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain. But that was not the condition of this quarter-section, being a part of the land originally ceded to the United States as the Northwest Territory, and afterwards specially set apart for their use for military purposes. Here the opening of these streets would also injure, if not destroy, the great objects of the reservation. Nor was any compensation proposed or made, as in other cases, for condemning this land and damaging the buildings thereon. It seems too, that, though land purchased within a state for ordinary purposes by the general government, must yield to the local public demands, yet land, when held like this, at first by an original cession to that government, and afterwards appropriated for a specific public object, cannot easily be shown liable to be taken away for an ordinary local object, though public, and especially one under another government and by mere implication. United States v. Ames, 1 Woodb. & Min. 88. It must be for a public object, clearly superior or paramount, or to which preference is expressly given by law or the constitution, in order to make the right clear to seize and condemn land so situated. West River Bridge Co. v. Dix, 6 How. 543, 544, and cases there cited; 4 Gill & Johns. 108, 150." See, also, Red River, etc. R. R. Co. v. Sture, 32 Minn. 95, holding that a settler who has entered public land under the homestead law, although he has not received a patent, has an inchoate title to the land, and it cannot be taken without making compensation. *Contra*, Flint & P. M. R. R. Co. v. Gordon, 41 Mich. 420.

[1] Beekman v. Saratoga & Schenectady R. R. Co. 3 Paige, 45; Brimmer v. Boston, 102 Mass. 19. The last case holds a street may be established over a wharf, and over land the city had conveyed for the purpose of a wharf to the owner, though the city agreed with the purchaser it would not obstruct the wharf.

[2] Trustees of Belfast Academy v. Salmond, 11 Me. 119. University of Minnesota v. St. P. & N. Pac. R. R. Co. 36 Minn. 449: "The court finds that, as appears from the records of the regents of the university, the professor of agriculture had recommended 'that authority be granted to the executive committee to purchase lots adjoining the horticultural grounds for the erection of a farm-house and the necessary out-buildings, if it should be thought best to do so.' This appears to have been in June, 1882. The communication was accordingly referred to the executive committee for their action. This committee was composed of four or five members, and subsequently two of the

been devoted to public use, even under the exercise of the right of eminent domain, they may be taken where they are not used for such purpose, and can be taken without destroying the pub-

members of the committee negotiated for and purchased seven lots, viz., lots 1, 2, 3, 4, 5, 7 and 8, in block 13, in St. Anthony city, including the three lots in controversy, at the agreed price of $4,900, and obtained a deed therefor, running to one of them, purporting to convey the same to him, January 21, 1884, and the title to them still remained in him at the commencement of these condemnation proceedings. It is further found 'that the purchase money belonged to the university, and the title was taken in the name of one of the two members referred to by their mutual arrangement,' to facilitate the transfer of such portion of said property as might be desirable to sell. A verbal report of said purchase was made to the regents, but no action was ever taken thereon. It also appears 'that the professor of agriculture of said university desired to have erected upon lots 4, 5, 6 and 7, of block 13, a cottage for the assistant superintendent of agriculture, and a barn in which to keep two or more horses employed on the *campus*, and for storing tools, etc.; but no action in respect to such matter was ever taken by such regents, so far as appears from the records of their meetings.' The title to lot 6, which the professor desired for a site of the proposed cottage, was not acquired, but is owned by the defendant; 'that said regents never made any appropriation of said property other than as above stated, nor has it ever been occupied by plaintiff for any purpose whatever.' There are no other findings of fact upon the question. Up to the time of the commencement of the condemnation proceedings in May, 1885, therefore, it is apparent that the board of regents had taken no action in respect to the purchase or appropriation of the particular property. The recommendation or wishes of the professor of agriculture of itself determined nothing. It does not appear that the executive committee consulted or took any action in the premises. The two members of the committee, who unquestionably acted in the utmost good faith, assumed to make the purchase, the result of which, it is evident, was intended by the purchaser to be for the benefit of the university, whether it should eventually be found desirable for the regents to accept it and take the title thereto, or that it should be sold by the grantee, as, while the matter remained thus *in statu quo* and undetermined, it undoubtedly could be. But, conceding that it was for the interest of the regents to ratify, and that by their silence they are to be deemed to have consented to the plans and arrangements of these parties as far as they had proceeded, the supposed ratification could, of course, extend no further, and the matter was simply left in their hands. It does not appear that it was at any time determined by the regents to acquire the title or to select or appropriate any part of the property for the university. Had such determination been made, doubtless some action would have been taken to have the title conveyed to the state, or the plaintiff, as its nominal trustee. The recommendation of the agricultural professor for additional ground, which had been made by him several years before the condemnation proceedings, for some

lic purpose to which they are devoted.[1] But where lands have been appropriated for public use, and are used therefor, and a necessity for such use exists, they cannot be devoted to another public use where such use would be detrimental to the present

cause does not seem to have been pursued any further. One of the lots desired was not obtained, and it does not appear that the board ever took any action indicating that the property was desired or required for the use of the university for the purposes recommended by the agricultural professor, or any other. The person holding the legal title, as well as the state, was made a party to the condemnation proceedings. The attorney-general appeared and answered, setting up the claim of the university to the premises, and there is no reason to doubt that the rights of the plaintiff were fully represented and protected; and, upon the record of the state of the title, we think the court was warranted in refusing the plaintiff's motion for specific findings touching the fact of notice to the defendant of the plaintiff's interest in the premises, for the purpose of showing the necessity of its being formally added as a party to the condemnation proceedings. It would not, in any event, by itself, constitute a meritorious ground for an injunction to stay the prosecution of the improvement by the railway company. If the university had acquired the title, or the property had been authoritatively purchased and held for its use, doubtless these lots would not have been subject to condemnation proceedings. The case of lands or lots held for sale under legislative authority presents an entirely different question."

[1] Matter of N. Y. R. R. Co. 99 N. Y. 22: "It is further contended that the property sought to be taken is already so devoted to the public use as to protect it from condemnation to another public use. The proof shows that the Union Steamboat Company is a corporation created by and existing under the laws of this state, and engaged in the business of carrying by water, passengers and freight, on the great lakes of the north, and using the property in question as a dock or wharf for the landing and delivery of a portion of its freight. In one sense, therefore, the property is already in use for public purposes, and quite as much so, it is contended, as it will or can be when devoted to the uses of the petitioner. Undoubtedly, the facts bring us to the inquiry whether the use of corporate property for the public convenience and for purposes of a *quasi* public character is sufficient to protect it from the grasp, under the right of eminent domain, of another corporation whose property is held for similar public uses. The law did not confer upon the steamboat company the right to acquire land *in invitum*, and that now held by it is held in purchase and by the same tenure as that of a private individual. The general authority conferred upon railroad corporations to acquire lands against the will of the owner is broad and comprehensive. In terms it covers all and excepts none. But because it could not be intended that the state, having authorized one taking, whereby the lands became impressed under authority of the sovereign with a public use, meant to nullify its own grant by authority to another corporation to take them again for another public use unless it so specifically decreed. It has been

use. Hence, highways cannot be laid out through depot grounds, shops of railways, or longitudinally along the right of way of a railroad.[1] Every franchise granted is in its nature,

ruled that lands held and impressed with a public trust were not embraced in words of general authority. Were the rule otherwise this evil would result: a corporation, number one, having the right of eminent domain, takes land from a similar corporation, number two, having the same right; number two thereupon proceeds again to condemn it for its own use, and number one retaliates, and so the absurd process goes on. It is clear that the legislature never meant any such result, and hence, from any general grant containing in its terms no word of exception, there is necessarily excepted property already held upon a public trust by the authority and under the ward and control of the state. An examination of the cases in this court will show that the exception has gone no further. Matter of B. & A. R. R. Co. 53 N. Y. 574; Matter of N. Y. C. & H. R. R. R. 68 id. 326; Matter of Rochester Water Com'rs, 66 id. 413; Matter of the City of Buffalo, 68 id. 167; P. P. & C. I. R. R. Co. v. Williamson, 91 id. 552." See Matter of Staten Island Rapid Transit Co. 103 N. Y. 251.

[1] St. Paul Depot Co. v. St. Paul, 30 Minn. 362: "The fact conclusively appears that the land in question is needed and is actually used for a public purpose, authorized by plaintiff's charter. This places plaintiff's rights upon the same footing as if the necessity and propriety of its appropriation had been preliminarily determined by the court or legislature. Plaintiff's beneficial use is practically exclusive and cannot be appropriated or taken away except by express authority of the legislature, or by necessary implication. Milwaukee & St. P. R. R. Co. v. City of Faribault, 23 Minn. 167. This amount of land seems to be indispensable now, to say nothing of the future demands of plaintiff's business, and the plaintiff is not necessarily limited to a use of this portion of its depot grounds without any modification of the present arrangement. It is entitled to make any changes in the sidewalk, baggage-rooms or otherwise which may better facilitate the use of the premises for depot purposes. The power to extend streets and highways across railway tracks, at convenient and suitable places, is necessarily implied in the general authority conferred on cities and towns for such purposes, without express provisions on the subject. . . . This general presumption, however, yields where the second improvement proceeds under a general power, the exercise of which in a particular instance would be subversive of a prior public use. Milwaukee & St. Paul R. R. Co. v. City of Faribault, 23 Minn. 167; In re City of Buffalo, 68 N. Y. 167-174." Prospect Park, etc. R. R. Co. v. Williamson, 91 N. Y. 558: "The general principle that land once taken and appropriated to a public use, pursuant to law, under the right of eminent domain, cannot, under general laws and without special authority from the legislature, be appropriated to a different public use, is well established (Mills on Eminent Domain, ch. 5, secs. 45, 46, etc., and cases cited), and does not appear to be controverted on the part of the defendants." See Atlanta v. Cent. R. R. Co. 53 Ga. 120.

and in the absence of express provisions to the contrary, exclusive, except as against the government.[1] It may be extinguished under the right of eminent domain, which is one of the inherent powers of the government and inseparable from sovereignty, unless withheld from it by fundamental law.[2] But so long as

[1] See N. Y. & L. B. R. R. Co. v. Drummond, 46 N. J. L. 644. Compare C., R. I. & P. R. R. Co. v. Town of Lake, 71 Ill. 333. This last case permits the right to lay streets across depot grounds when buildings are not destroyed. Bridgeport v. N. Y. & N. H. R. R. Co. 36 Conn. 263: "In the first place it is questionable whether the city of Bridgeport had power thus to take the land appropriated and occupied by the railroad, for such a purpose. The city of Bridgeport is authorized by its charter to lay out necessary public highways. In doing this its officers act under authority delegated by the legislature in general terms, and in the exercise of that power the officers of the city perform the same public duty, and have substantially the same authority within their territorial limits by the provisions of their charter, that the officers of boroughs and towns have and exercise in like cases and no more, and that is, an authority to lay out such streets and highways as public convenience and necessity may require. In doing that they may take and appropriate any property which has not been before subjected to the eminent domain of the state. But is the ribbon of land which the legislature in the exercise of that right of eminent domain have authorized this railroad company to take, appropriate and hold for the construction of a railroad, subject to be taken from them in whole or in part, and in the whole if in part, under a power to lay out highways previously given in general terms by the authorities of every town, city or borough between New Haven and the western line of the state and appropriated for the purposes of a highway? This question has not, to my knowledge, been judicially determined, but it would seem upon principle that it must be answered in the negative." N. J. S. R. R. Co. v. L. B. Com'rs, 39 N. J. L. 28; R. & D. B. R. R. Co. v. Del. & Rar., C. & C. & A. R. R. & T. Co. 3 C. E. Green, 546.

[2] Kohl v. United States, 91 U. S. 371: "The powers vested by the constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories and arsenals, for navy-yards and light-houses, for custom-houses, postoffices and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practice or existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain, a right distinct from, and paramount to, the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from

the legislative will is manifest that the franchise shall continue, it subsists under, and is sustained by, the sovereign power of the government.

§ 176. The taking of property of one railroad for the benefit of another.— That one railway company may take property from another railway company devoted to public use cannot be doubted, but the right only exists in a degree.

the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity, and it is inseparable from sovereignty unless denied to it by its fundamental law. Vattel, chs. 20, 34; Bynk. lib. 2, ch. 15; Kent's Com. 338-340; Cooley on Const. Lim. 584 *et seq.* But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it, but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder. . . . It is true, this power of the federal government has not been heretofore exercised adversely, but the non-user of a power does not disprove its existence. In some instances the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in the Gilmer v. Lime Point (18 Cal. 229) case, where lands were condemned by a proceeding in a state court and under a state law for a United States fortification. A similar decision was made in Burt v. Merchants' Ins. Co. 106 Mass. 356, where land was taken under a state law as a site for a postoffice and subtreasury building. Neither of these cases denies the right of the federal government to have lands in the states condemned for its uses under its own power and by its own action. The question was whether the state could take lands for any other public use than that of the state. In Trombley v. Humphrey, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction, and of the right of exclusive legislation after the land shall have been acquired."

It is based on the law of necessity.[1] It may be appropriated for the purpose of a crossing, or streets may cross railways whenever the use does not destroy the right previously granted, and the exercise is a necessity.[2] It has been held that not only corporate property, but the franchise itself, may be taken for

[1] See § 174, note 2. Housatonic R. R. Co. v. Lee & Hudson R. R. Co. 118 Mass. 391; Worcester & Nashua R. R. Co. v. R. R. Com'rs, 118 id. 561; Boston & Maine R. R. Co. v. Lowell & L. R. R. Co. 124 Mass. 368; A. & F. R. R. Co. v. A. & W. R. R. Co. 75 Va. 780; Oregon Cascade R. R. Co. v. Baily, 3 Ore. 164; Contra Costa R. R. Co. v. Moss, 23 Cal. 323; Cal. Pac. R. R. Co. v. Cent. Pac. R. R. Co. 47 Cal. 549. Providence R. R. Co. v. N. & W. R. R. Co. 138 Mass. 279: "When it appears by the statute, or by the application of the statute to the subject-matter, that the contemplated road cannot reasonably be built without appropriating land already devoted to public use, an implication arises that the legislature intended that such appropriation might be made." If the property sought to be condemned is not in use for public purposes, then the appropriation of the land can be made and taken by another company. See P. P. & J. R. R. Co. v. P. & S. R. R. Co. 66 Ill. 174. Or when only a small immaterial portion is necessary. Chicago & N. W. R. R. Co. v. C. & E. R. R. Co. 112 Ill. 589; N. Y. H. & N. R. R. Co. v. B. H. & E. R. R. Co. 36 Conn. 196; North Carolina R. R. Co. v. Carolina Cent. R. R. Co. 83 N. C. 489. And where the statute authorized the taking of any real estate, franchise or easement of any corporation, the taking by one railroad of part of the right of way of another not occupied by tracks was sustained, with remarks by the court which go much beyond the necessities of the case. Northern R. R. Co v. Concord & Claremont R. R. Co. 27 N. H. 183. See Matter of City of Buffalo, 68 N. Y. 167. And also where the exercise of the right does only immaterial injury. W. U. Tel. Co. v. Am. Tel. Co. 65 Ga. 160.

[2] See Dillon on Munic. Corp. (4th ed.) secs. 705–7 and extensive notes. C. N. & S. R. R. Co. v. Newton, 36 Iowa, 299; Slatten v. D. M. V. R. R. Co. 29 Iowa, 148; Clinton v. Cedar Rapids & Mo. R. R. R. Co. 24 Iowa, 455, 480; Springfield v. Conn. River R. R. Co. 4 Cush. 63, where the subject is fully considered by Shaw, C. J. The court held that if the road chartered by the legislature could not be built in Cabotville without using a street or highway, so much of such street or highway might be used (although there were no express words to that effect in the charter) as should be "reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made." See, also, Roxbury v. Boston & Prov. R. R. Co. 6 Cush. 424; Brainard v. Conn. River R. R. Co. 7 Cush. 506; Moses v. P. Ft. W. & C. R. R. Co. 21 Ill. 516; Northeastern R. R. Co. v. Payne, 8 Rich. L. (S. C.) 177; Com. v. E. & N. E. R. R. Co. 27 Pa. St. 339; Attorney-General v. Morris & E. R. R. Co. 19 N. J. Eq. 386; Lewis, Em. Dom. sec. 270; Chicago & W. I. R. R. Co. v. Dunbar, 100 Ill. 110.

public use when the necessity therefor arises.[1] But the cases usually, and I think all of them, apply to private corporations, and not those organized for public purposes; but the right exists where the necessity is urgent.[2] In considering this question it must be borne in mind that public improvement denotes an advancing and progressive condition of society, moving in the steps of science; and hence that which was a few years ago a high step in the direction of progress is now a matter of common occurrence; when progress destroys or renders useless the necessity for a particular improvement, the legislature has a right, upon providing for compensation, to nullify the franchise in favor of additional betterments and modern advances in the public interest. The desire to erect a new structure will not authorize the destruction of an existing one of equal necessity, or one that is still regarded as essential for the public.[3] To the note below I have copied the text and note of

[1] See note 2, *infra*.

[2] Mill ponds may be crossed or used by a railway company, although somewhat damaged thereby, under the general act of eminent domain. See White v. South Shore R. R. Co. 6 Cush. 412. Mill-dams may be improved or taken for railway purposes. Hazen v. Essex Co. 12 Cush. 475. Land of a gas company in use may be taken. N. Y. Cent. & Hud. Riv. R. R. Co. v. Met. Gaslight Co. 68 N. Y. 326. So a cemetery belonging to a parish has been taken and made a part of a general burying ground for a city. Balch v. Co. Com. 103 Mass. 106. Also where a private statute was passed giving a cemetery association a right to burying ground and providing it should not be taken for any other purposes than the burial of the dead, and that no street or alley should be laid through it, it was held it might by law be taken under a statute passed authorizing the taking for street purposes. In re Twenty-second Street, 102 Pa. St. 108.

[3] 2 Dillon on Mun. Corp. (4th ed.) sec. 588: "The following propositions . . . are well supported: . . . That the legislature may, in the exercise of the right of eminent domain, deprive corporations of their property and franchises upon making compensation; but this can be done only under power to that end specially or expressly granted. West River Bridge Co. v. Dix, 6 How. 507; Backus v. Lebanon, 11 N. H. 19; N. Y. Cent. & H. R. R'y Co. v. Met. G. Co. 68 N. Y. 326, 334; Buffalo, In re, 68 N. Y. 167; N. Y. R. R. Co., In re, 99 N. Y. 12; Pros. Pk. & C. I. R. R. Co. v. Williamson, 91 N. Y. 552; Rochester Water Com., In re, 66 N. Y. 413; Lewis on Em. Dom. sec. 274; Mills, Em. Dom. secs. 41, 42, 46; Leeds v. Richmond," 102 Ind. 372. Under a general power to lay out and extend streets, a city may extend a street across the roadway of a railroad company. 'The appropriation made by the city is, of course, subject to the prior public use, but the two uses are not necessarily inconsistent, and in all ordinary cases may stand together. The general rule is that the power to extend streets across the

Judge Dillon, believing that it contains the best illustration and most concise rules I have seen laid down on this subject.

§ 177. General principles deducible from the law of eminent domain.— While property held for public use may be taken again for other public use, when a more urgent necessity arises, this sole exception exists: it cannot be taken for the same purpose for which it was originally appropriated, *while in use for such purpose.*[1] The right to take property

right of way and tracks of a railway company is implied in the general authority conferred by city charters for such purposes, without express legislative provision upon this subject.' Vanderburgh, J., St. P., Minn. & M. R. R. Co. v. Minneapolis, 35 Minn. 141. But under such a power a city cannot lay out a street through the depot grounds of a railroad company so as to destroy or impair the value of the company's easement therein lawfully acquired. Mil. & St. N. R. R. v. Faribault, 23 Minn. 167; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359; S. C. 15 N. W. Rep. 684; Pros. Pk. & C. I. R. R. v. Williamson, *supra.* If a corporation holds land or property as a private proprietor and not for public uses, this may be taken under the power of eminent domain the same as if owned by an individual. New York Cent. & H. R. R. R. Co. v. Met. G. Co. 68 N. Y. 326, 334; Mills, Em. Dom. 41, and cases; Lewis, Em. Dom. 267. But lands held by a corporation upon a special trust for public use, and thus used, cannot be compulsorily appropriated to another public use without special or clear authority from the legislature. Boston & A. R. R. Co., In re, 53 N. Y. 574; Rochester Water Com., In re, 66 N. Y. 413, 418. A street is a public franchise which cannot be violated except by direct legislative grant. Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150; Portland & W. Va. R. R. Co. v. Portland, 14 Ore. 188. In this case land which had been dedicated for a levee over public building was taken by a railroad company, under authority of an act of the legislature, for a depot, freight-house, etc., and it was held that the grant to the railroad company was not inconsistent with the use to which the land had been dedicated, but was in aid of it, and that the easement of a city in its public streets or public places is not private property for which compensation must be given when taken for public use, but is public property, the use whereof may be regulated by the legislature. And hence a corporation cannot, under a general power to condemn property for public use, take from another corporation having like power property held by it, under legislative authority for public purposes, although it may, it seems, under such general power, acquire an easement *in invitum* in such property, when this can be done without doing injury to the public or essentially interfering with the uses for which it was acquired and is held by the corporation which owns it."

[1] West River Bridge Co. v. Dix, 6 How. 531: "In considering the question propounded in these causes there can be no doubt, nor has it been doubted in argument on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared or implied, formed

that the legislature has already devoted to public use must be given in express terms or must appear by necessary implication.[1] Whether the legislature has given the power or

a contract between the plaintiffs and the state of Vermont, which the latter, under the inhibition in the tenth section of the first article of the constitution, could have no power to impair. Yet this proposition, though taken as a postulate on both sides, determines nothing as to the real merits of these causes. . . . No state, it is declared, shall pass a law impairing the obligation of contracts. Yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relation of government. They reach and comprehend likewise the interior policy and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. The constitution of the United States, although adopted by the sovereign states of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the states. There is no express delegation of it by the constitution, and it would imply an incredible fatuity in the states to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in nowise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other. . . . But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself, they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to

[1] Housatonic R. R. Co. v. Lee & H. R. R. Co. 118 Mass. 391; Boston & M. R. R. Co. v. Lowell R. R. Co. 124 Mass. 368; Providence & Worcester R. R. Co. v. Norwich & W. R. R. Co. 138 Mass. 277; N. J. & Southern R. R. Co. v. Long Branch Com. 39 N. J. L. 28; Matter of B. & A. R. R. Co. 53 N. Y. 574; People v. Thompson, 98 N. Y. 6.

not is one of statutory construction; and if the statute is express, then the courts only have to enforce the law; if the statute is not clear and certain, then the question of reason-

impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. . . . In fact the whole policy of the country relative to roads, mills, bridges and canals rests upon this single power under which lands have been always condemned, and without the exertion of this power not one of the improvements just mentioned could be constructed. In our country it is believed that the power was never, or, at any rate, rarely questioned, until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen, an opinion which must be without any grounds to rest upon until it can be demonstrated either that the ideal creature is more than a person or the corporeal being is less. . . . A distinction has been attempted, in argument, between the power of a government to appropriate, for public uses, property which is corporeal, or may said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes, namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone when treating in his second volume, chapter 3, page 20, of the rights of things. . . . A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the constitution, and no violation of a contract. . . . This right of resumption may be exercised not only where the safety, but also where the interest or even the expediency of the state is concerned. . . . No state could resume a charter under the power of appropriation and carry on the function of the corporation. A bank charter could not be thus taken, and the business of the bank continued for public purposes. Nor could this bridge have been taken by the state and kept up by it as a toll-bridge. This could not have been called an appropriation of private property to public purposes. There would be no change in the use except the application of the profits, and this would not bring the act within the power. The power must not only be exercised *bona fide* by the state, but the property, not its product, must be applied to public use. It is argued

able intendment arises and all the surrounding circumstances may be considered. Where an absolute necessity arises because of the location and topographical condition of the coun-

that if the state may take this bridge it may transfer it to other individuals under the same or a different charter. This the state cannot do. It would, in effect, be taking the property from A. to convey it to B. The public purpose for which the power is exerted must be real, not pretended. If in the course of time the property by a change of circumstances should no longer be required for public use it may be otherwise disposed of. But this is a case not likely to occur. The legality of the act depends upon the facts and circumstances under which it was done. If the use of land taken by the public for a highway should be abandoned, it would revert to the original proprietor and owner of the fee. It is objected that this bridge, being owned by a corporation and used by the public, does not come within the designation of private property. All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property not public is private. . . . I take the liberty to say, then, as to the cardinal principle involved in this case, that, in my opinion, all the property in a state is derived from or protected by its government, and hence is held subject to its wants in taxation, and to certain important public uses, both in war and peace. Vattel, B. 1, ch. 20, sec. 244; 2 Kent, Comm. 270; 37 Am. Jurist, 121; 1 Bl. Comm. 139; 3 Wils. 308; 3 Story on Confl. 661; 3 Dallas, 95. Some ground this public right on sovereignty. 2 Kent, Comm. 339; Grotius, B. 1, ch. 1, sec. 6. Some on necessity. 2 Johns. Ch. 162; 11 Wend. 51; 14 Wend. 51; 1 Rice, 383; Vanhorne's Lessee v. Dorrance, 2 Dal. 310; Dyer v. Tuskaloosa Bridge, 2 Porter, 303; Harding v. Goodlett, 3 Yerger, 53. Some on implied compact. Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & Bat. 456; 2 Bay, 36, in South Carolina; 3 Yerger, 53. Where a charter is granted after laws exist to condemn property when needed for public purposes, others might well rest such a right on the hypothesis that such laws are virtually a part and condition of the grant itself, as much as if inscribed in it *totidem verbis*. Towne v. Smith, 1 Woodbury & Minot, 134; 2 How. 608, 617; 1 id. 311; 3 Story on Const. secs. 1377, 1378, *quære*. But however derived, this eminent domain exists in all governments, and is distinguished from the public domain, as that consists of public lands, buildings, etc., owned in trust exclusively and entirely by the government (3 Kent, Comm. 339; Memphis v. Overton, 3 Yerger, 389), while this consists only in the right to use the property of others, when needed, for certain public purposes. . . . It is laid down also by Justice Story that 'a grant of a franchise is not in point of principle distinguishable from a grant of any other property.' Dartmouth College v. Woodward, 4 Wheat. 699, 701. I concur, therefore, in the further views that the corporation is a franchise, and all its powers as franchises, both being in property, may for these and like reasons, in proper cases, be taken for public use for a highway. Peirce v. Somersworth, 10 N. H. 370; 11 N. H. 20; Piscat. Br. v. N. H. Br. 7 N. H. 35, 66; 8 N. H. 398, 143; 11 Pet. 645; Story, J., in Warren Br. v. Charles River Br. 11

try, the taking of the use of a track, right of way, or property already devoted to public use, if such taking does not destroy

Pet. 582; 2 Kent, Comm. 340, note; 2 Pet. 658; 5 Paige, Ch. 146; 1 Rice, 383; 2 Porter, 296; 7 Adol. & Ellis, 124; 8 Yerg. 41; 2 Fairf. 222; 23 Pick. 360; J. Bonaparte v. C. Railroad, Baldw. C. C. 205; Tuckahoe Canal Co. v. The T. & J. River Railroad Co. 11 Leigh, 42; Enfield Br. Co. v. Hartford & N. H. R. R. 17 Conn. 40; Armington v. Barnet, 15 Vt. 745; 16 Vt. 446, this case; 3 Cow. 783, 754; 11 Wend. 590; Lex. & O. R. R. Cases, 8 Dana, 289; 18 Wend. 14. It must be confessed that some surprise has been felt to find this doctrine so widely sustained, and in so many of the states, and yet no exact precedent existing in England. . . . I am even disposed to go further and say that if any property of any kind is not so situated as to be either in the direct path for a public highway or be really needed to build it, the inclination of my mind is that it cannot be taken against the consent of the owner. Because, though the right of eminent domain exists in some cases, it does not exist in all, nor as to all property, but probably as to such property only as from its locality and fitness is necessary to the public use. *Semb.*, 4 Mylne & Craig, 116; Webb v. Manch. & Leeds R. R. Co. 1 R'y Cas. 576. It may be such not only for the bed of the road, but perhaps for materials in gravel, stone and timber to build it with. Yet even then it must be necessary and appropriate as incidents. 2 Dev. & Bat. 462; 13 East, 200. . . . Nor do I agree that, in all cases of a public use, property which is suitable or appropriate can be condemned. The public use here is for a road, and the reasoning and cases are confined chiefly to bridges and roads and the incidents to war. But the doctrine that this right of eminent domain exists for every kind of public use, or for such a use when merely convenient, though not necessary, does not seem to me to be by any means clearly maintainable. It is too broad, too open to abuse. Where the public use is one general and pressing, like that often in war for sites of batteries or for provisions, little doubt would exist as to the right. *Salus populi suprema est lex.* So as to a road, if really demanded in particular forms and places to accommodate a growing and changing community, and to keep up with the wants and improvements of the age,—such as its pressing demands for easier and social intercourse, quicker political communication or better internal trade,—and advancing with the public necessities from blazed trees to bridle-paths, and thence to wheel-roads, turnpikes and railroads. . . . So a custom-house is a public use for the general government, and a court-house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence, while as to a light-house or fort, or wharf or highway between certain *termini*, it may be very important and imperative." Osborn v. Nicholson, 13 Wall. 660, holding: "All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not

the right formerly granted, will be lawful.[1] The statute may determine the quantity to be taken, it has been held, but we think that there are limits to such power, and that such acts

within that provision of the national constitution which forbids the state to pass laws impairing their obligation. The power acts upon the property which is the object of the contract, and not upon the contract itself."

[1] Matter of City of Buffalo, 68 N. Y. 170: "The lands in question are held or occupied by the several railroad corporations, in different rights, for the public purposes which are served by their special instrumentality. It is true that at the same time, and in greater degree perhaps, the private interests of the corporators, or of those who manage the corporations, are also advanced. But however much the doctrine may have been doubted and questioned at the first assertion of it, it is now firmly fixed, that railroad corporations may acquire and hold lands for a public purpose. It is a part of the law of eminent domain. The courts, who are set to declare the law and not to find fault with it, are bound so to pronounce it and to conform their adjudications to it. These lands thus held for a public purpose, the city of Buffalo seeks to take for another public use, which it is charged to promote. The legislature may interfere with property held by a corporation for one public use, and apply it to another, and without compensation, where no private interests are involved or invaded. The People v. Kerr, 27 N. Y. 188. The legislature may delegate this power to public officers or to corporate bodies, municipal or other. It is a rule, however, that such delegation of power must be in express terms, or must arise from a necessary implication. In re Boston & A. R. R. Co. 53 N. Y. 574; Boston Water Power Co. v. B. & W. R. R. Co. 23 Pick. 360. . . . So, if the legislature should give power by special charter to a railroad corporation to build a road from Albany to Utica along the banks of the Mohawk, and to pass through Little Falls, with power conferred in general terms to take and hold all lands needful therefor, we should of necessity imply that power was given to take so much of a public highway, already laid out in the narrow space through which that river runs at the last named place, as was needful to construct the railway track. Here the implication would arise, from the application of the special charter to the subject-matter of it, as by reasonable intendment the railway track could not be laid on any other line. But if a railroad corporation should organize under the general railroad acts, in general terms to build a railway from Albany to Utica, would there be a necessary implication from the general gift of power in those acts to the lands, that such corporation could appropriate the town highway, or state canal, or track of the New York Cent. R. R. Co., already existing in the narrow rocky ravine at Little Falls? And yet it might be made quite plain by testimony that a railroad could not be built through that gorge without taking the place there of one of those existing public works. . . . So, in the case in hand, had the legislature by especial act lately given power to the city of Buffalo to extend the Main and Hamburg street canal between the *termini* named in the resolution of the common coun-

clearly should be and always will be closely and strictly construed to meet the right in the case.[1]

cil, and to take all property upon the designated route needful for the work, we should be bound to presume that the legislature meant that any prior public use of any of such property must become secondary to the use thus now declared, just as if the law-making power had stood upon the ground, and took into physical vision the exact situation of everything comprehended in the subject-matter of the enactment. But would it not be extravagant to infer from a clause in a general enactment conferring various municipal powers, and comprehending in its forecast no special occasion or place for the exercise of them, that the legislative eye looked upon every possible emergency, and bound up in the gift of power, expressed in most general terms, every possible future result? It is fairly to be argued that, though there is no term or limitation in the charter upon the power of the city, still if the legislature had already appropriated the lands to another important public use, it is not to be presumed that it was meant to extend the power so as injuriously to affect that. . . . In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid, if the latter use, when exercised, must supersede the former, it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise, to one which might thereafter arise." See Anniston R. R. Co. v. Jacksonville R. R. Co. 82 Ala. 297; Den. & R. G. R. R. Co. v. Den., S. P. & P. R. R. Co. 17 Fed. Rep. 867. The presumption is against the right to take property already in use by the public, as shown above. See Lewis on Em. Dom. sec. 276. See, also, C. & N. W. R. R. Co. v. C. & E. R. R. Co. 112 Ill. 589; N. Y. & L. B. R. R. Co. v. Drummond, 46 N. J. L. 644; M. & St. P. R. R. Co. v. Faribault, 23 Minn. 167; P. P. & C. I. R. R. Co. v. Williamson, 91 N. Y. 552.

[1] See C. & O. C. Co. v. Mason, 4 Cranch, C. C. 123; Lochree v. W. U. Tel. Co. 103 Ill. 401. The law of necessity governs, and streams and watercourses cannot be changed unless absolute necessity exists. Watson v. Acquackanonck Water Co. 36 N. J. L. 196: "The water company proposes to erect works upon its own premises, by which, without taking the bed of the stream, or any part of the plaintiff's lands, it will divert from the plaintiff the waters of Weasel brook, and take and use the same in its reservoir, and commingle with and flow into Weasel brook the less pure water of the Dundee canal. In pursuit of this object the defendant has procured an order to be made by one of the judges of the court of common pleas of said county, appointing commissioners to assess the damages which John Watson will sustain by the contemplated work. The legality of this order is the sub-

§ 178. Method of exercising the right, conditions precedent, and like subjects pertaining thereto.— We have before said that the statute granting the right should be strictly construed, and this rule of construction applies to each portion of the statute. It need hardly be observed that preliminary steps for the exercise of the right must be taken in accord with the statute. The subject of notice has been discussed, but compliance with other provisions, expressed or implied, is equally essential. It is not infrequent that statutes conferring the power of eminent domain require that an effort shall be made by the party desiring to exercise it to agree with the owner before instituting proceedings to condemn. Whenever such provision is found in the statute it does not matter in what words it is couched, they are words of limitation on the power, and must be complied with.[1] It has been often held that

ject of contest in this case. The question is whether the defendant, under its charter, can condemn the right which the plaintiff has to the flow over his close of the uncorrupted waters of the Weasel brook without including and taking the bed of the stream. It is a familiar principle that corporations, being the creatures of legislation, are precisely what their organic act makes them, and beyond that nothing. They must act strictly within their limited spheres, and for every function they claim to exercise they must find authority in legislative grant. . . . The power is expressly given in these sections to condemn lands, and to assess the consequential damages resulting from taking lands, not to assess damages where no lands are taken. But it is insisted that from the right given in the latter part of the fifth section, 'to do all other things which shall be suitable or necessary for completing the works thereby contemplated,' there is an implied grant of power to do whatever is necessary to acquire what is suitable for their use. It is obvious from the connection in which these words are used that they were not intended to carry a power of condemnation, but to enable the company to do any other act of a like nature with those enumerated. In the third section of the charter, power is given the company to obtain and secure, by purchase, the right to use, divert and appropriate any springs, streams or ponds of water. The omission to give express power to condemn what by the third section may be acquired by purchase, furnishes a strong implication that the right to condemn was not intended to be co-extensive with the power to purchase." Brown v. Corey, 43 Pa. St. 495; Johnston v. C., M. & St. P. R. R. Co. 58 Iowa, 537. See Lewis on Em. Dom. secs. 280 to 287 inclusive.

[1] The case of Zeigler v. Hopkins, 117 U. S. 687, is very important, and as the statement of it is long, I condense: Where a statute provides that the majority of the owners of the frontage of lots to be benefited by opening a street should petition certain officers for the opening thereof,

where the owner has been treated with, the inability to agree should be alleged and proven.[1] No definite rule can be laid

the officials should organize a board and act, and when the petition was presented and the board acted, held, that an interested party could show a majority had not signed a petition representing the required frontage. "There is in reality but a single question presented for our consideration in this case, and that is whether, in an action of ejectment brought to recover the possession of lands sold for the non-payment of taxes levied to defray the expenses of opening Montgomery avenue generally, and not in obedience to an order of a court of competent jurisdiction to meet some particular liability which had been judicially established, the land-owner is estopped from showing, by way of defense, that the petition for the opening presented to the mayor was not signed by the owners of the requisite amount of frontage; and this depends on whether the owner is concluded (1) by the acceptance of the petition by the mayor and his certificate as to its sufficiency and the action of the board of public works thereunder, or (2) by the judgment of the county court confirming the report of the board of public works. This precise question was most elaborately considered by the supreme court of California in Mulligan v. Smith, 59 Cal. 206, and decided in the negative after full argument. With this conclusion we are entirely satisfied. It is supported by both reason and authority. The opinions of Justices M'Kee, Sharpstein and Ross, which are found in the report of the case, leave nothing further to be said on the subject. 'A petition from the owners of a majority in frontage of the property to be charged with the cost of the improvement was necessary to set the machinery of the statute in motion,' and 'no step could be taken under the provisions of the statute until the requisite petition had been presented.' Neither the mayor nor the county court was 'authorized to enter into any investigation of the frontage as represented by the petition, or to adjudicate its sufficiency, or to make any record in reference to it.' 'The only powers which the county court, as a court of limited jurisdiction, was authorized to exercise,' were such as related to the matters contained in the report of the board of public works, and this did not include the petition." 2 Dillon, Munic. Corp. sec. 604, note 4: "If a charter requires a council to treat with an owner before condemning his land, an honest compliance with the requirement is jurisdictional. Merely receiving and tabling a proposal from the owner will not suffice. Laue v. Saginaw, 53 Mich. 442; Weckler v. Chicago, 61 Ill. 142, holding that two alleys cannot be included in one condemnation proceeding, and the value of lands taken for one be compensated by benefits derived from the other, because one alley intersects the other. 'It is a well-established rule that in matters of appropriation to public use, all the forms of law must be rigidly observed.' Street Case, 16 La. Ann. 393. Dennis v. Hughes, 8 Up. Can. Q. B. 444; Brice on Ultra Vires (Green's Am. ed.), 278 *et seq.* An enabling ordinance held to be necessary before a street can be opened or property condemned for public use in a municipal corporation. People v. Hyde Park, 117 Ill. 462."

[1] Gilmer v. Lime Point, 19 Cal. 47;

down as to what constitutes an attempt or effort to agree between the applicant for the purchase of the right sought to be condemned and the owner.[1] It need not be shown further than that the effort was made and could not probably be accomplished. The inability to agree should be alleged, however, and possibly the reason set forth.[2] And it seems such issue should be disposed of by the court.[3] Where the same property is sought to be condemned by two corporations or persons seeking its use for public purposes, the one that first institutes proceedings has priority.[4] This rule is probably correct where this is the first step taken, but it has been held that the one who first establishes and locates its line over the route takes precedence.[5]

The corporation desiring to exercise the right must of course be organized and the route designated so far as the land sought to be condemned is concerned; but the corporation is not required to take the land condemned unless it desires. It must, however, pay the costs and expenses made.[6]

When the taking must be by ordinance, resolution or vote of a municipal corporation or other body in advance of the proceedings to condemn, such ordinance must be formally passed, resolution adopted or vote taken in the manner provided by law, before any other action can be taken to con-

Lincoln v. Colusa Co. 28 Cal. 662; Williams v. Hartford & N. H. R. R. Co. 13 Conn. 397; Oregon R. R. Co. v. Oregon Real Estate Co. 10 Ore. 444; Powers v. R. R. Co. 33 Ohio St. 429; Matter of Marsh, 71 N. Y. 315.

[1] See Matter of the Village of Middletown, 82 N. Y. 196; Taylor v. Porter, 4 Hill, 146; Stuart v. Palmer, 74 N. Y. 183; Laue v. Saginaw, 53 Mich. 442; Matter of Application, etc. R. R. Co. 67 N. Y. 371. If the owner is under disability no attempt need be made. Balch v. Co. Com. of Essex, 103 Mass. 106. See United States v. Reed, 56 Mo. 565; Ward v. Minnesota R. R. Co. 119 Ill. 287.

[2] Matter of Marsh, 71 N. Y. 315.

[3] Doughty v. Somerville R. R. Co. 21 N. J. L. 442; Lake Merced Water Co. v. Cowles, 31 Cal. 215. See Hook v. Smith, 6 Mo. 225; Waterbury v. Dry Dock, etc. R. R. Co. 54 Barb. 388.

[4] New Brighton R. R. Co. v. Pittsburgh R. R. Co. 105 Pa. St. 18.

[5] Railway Co. v. Alling, 99 U. S. 463. This case holds that the company has priority that first locates its road in good faith over the line or road in dispute. See Morris & Essex R. R. Co. v. Blair, 9 N. J. Eq. 635; Sioux City R. R. Co. v. Chicago R. R. Co. 27 F. R. 770.

[6] Gear v. Dubuque & S. C. R. R. Co. 20 Iowa, 523; Corbin v. C. R. I. F. & N. W. R. R. Co. 66 Iowa, 73; Dimmick v. C. B. & St. L. R. R. Co. 58 Iowa, 637.

demn.[1] Sometimes one tribunal can act originally only on the refusal of another tribunal or board of officers; in such cases it is essential to the jurisdiction that the tribunal having the

[1] St. Louis v. Franks, 78 Mo. 41. Defects in ordinances destroy the right and render the proceedings void. Baltimore v. Grand Lodge, 44 Md. 436. See State v. Elizabeth, 32 N. J. L. 357. Also where the ordinance was not introduced at a preceding meeting. State v. Bergen, 33 N. J. L. 40: "It appears by the return to the *certiorari* in this case that at a regular meeting of the board held August 27, 1866, an ordinance was introduced to lay out and open a public street in said town over the property of Nathaniel C. Slaight and Albert Ackerman, from Westside avenue to Ackerman street, in which three commissioners are named. Afterwards, at a meeting held September 17, this ordinance was taken up, the name of one of the commissioners stricken out and another inserted and then adopted, and on the 19th of September it was signed by the president and approved by the mayor. It is objected that this ordinance is illegal because it materially varies from that introduced at the previous meeting, and, in my opinion, this objection is well taken. The commissioners are required to be appointed by ordinance and not otherwise. A change hastily made at a meeting, without having been previously introduced, would defeat the precise object of the charter, which was to insure deliberation in every important proceeding. In the case of State v. Jersey City, 2 Dutch. 448, the variance complained of was merely a slight variation of the title, in nowise affecting the construction of the ordinance, and was held to be immaterial. The variance in this case was in the most important part of the ordinance. The ordinance as adopted — prematurely, I think — declares that 'the said street is hereby laid out and opened,' although perhaps this error might not have been considered fatal to its validity had the subsequent proceedings been such as the charter requires, and the street had been properly confirmed. . . . These preliminary proceedings are important to enable the council properly to decide whether the improvement is proper to be made, as well as to inform the owners of land to be assessed how it will affect their interests." Defect in resolution: People ex rel. Johnson v. Whitney's Point, 32 Hun, 508. See Sower v. Philadelphia, 35 Pa. St. 231. The authority to act must appear in ordinance; anything done beyond it is void. Harbeck v. Toledo, 11 Ohio St. 219; Parks v. Boston, 8 Pick. 218; Shaffner v. St. Louis, 31 Mo. 264; Baltimore v. Eschbach, 18 Md. 276; Welker v. Potter, 18 Ohio St. 85. On the motion for re-argument in the Cable Co. Case, the court, through Rapallo, J. (104 N. Y. 43), said: "In order to sustain proceedings by which a body claims to be a corporation, and, as such, empowered to exercise the right of eminent domain, and under that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where it is sought to take the property of an individual under powers granted by an act of the legislature to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers

prior right to act should refuse, and such refusal on the part of the first tribunal must appear on the face of the proceedings.[1]

§ 179. Nature of the proceedings.— It has been held in most of the states that the proceeding for the condemnation of lands for public use is in its nature civil; such seems to be the general view. The supreme court of the United States say the suit is a common-law action within the meaning of the act of congress giving jurisdiction to the circuit courts of the United States by the removal of causes from the state courts.[2] The venue lies in the county or district in which

granted by the legislature be strictly pursued, and all the prescribed conditions be performed."

[1] Lewis on Em. Dom. sec. 309: "In the New England States, upon the neglect or refusal of the selectmen of a town to lay out a way which has been petitioned for, jurisdiction is given to some other tribunal to act in the matter, not by way of an appeal but by an original application. In such case the previous refusal or neglect is essential to jurisdiction, and should appear upon the face of the proceedings. Where the jurisdiction of county commissioners depended upon an unreasonable refusal of the town to accept the report of selectmen laying out a way, there must be a legal report to accept. The petition to the second tribunal may be signed by different persons, but it must be for the same road. The lay-out of a road includes all that is essential to its legal establishment, and a neglect to perform any essential act is a refusal within the statute. Where a petition was pending before selectmen for eight months, and their last action was to meet and view the route, and they then separated without any action or adjournment, it was held a sufficient neglect to give jurisdiction. The second tribunal is held to have the same powers as the selectmen in these premises, where not otherwise specified by law. Where an application is made to the second tribunal, showing the necessary neglect or refusal of the selectmen, if this is contested it should be done before the commissioners are appointed to act on the application, and if not the point is waived." See numerous cases cited; and see White v. Polk Co. 17 Iowa, 413; Ferguson v. Davis Co. 57 Iowa, 601; Fulton v. Monona Co. 47 Iowa, 622. Where notice is required to be given to all actual occupants of land over which the road was to be located, such notice is a condition precedent to the right to condemn, and all must be notified before action against any can be taken. Matter of Niagara Falls R. R. Co. 46 Hun, 94.

[2] Kohl v. United States, 91 U. S. 375: "The judiciary act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity when the United States or any officer thereof suing under the authority of any act of congress are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the circuit court. That it is a 'suit' admits of no question. In Weston v. Charles-

the land is situated, and the action should be brought therein or in the county or district in which the land or property is injuriously affected. The statute regulates such proceedings usually, but the action being in the nature of an injury to realty, it must be local by common-law rules.[1]

The right of trial by jury in many states does not apply to this class of actions, but, where the constitution of the state provides for a trial by jury, the law is complied with if a right of appeal is provided for, whereby a trial by jury may be had on the assessment of damages on appeal.[2] These pro-

ton, 2 Pet. 464, Chief Justice Marshall, speaking for this court, said: 'The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various, but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit.' A writ of prohibition has therefore been held as a suit; so has a writ of right of which the circuit court has jurisdiction (Green v. Liter, 8 Cranch, 229); so has *habeas corpus*. Holmes v. Jennison, 14 Pet. 564. When, in the eleventh section of the judiciary act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, as distinguished from rights in equity as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial, for many civil as well as criminal proceedings at common law were without a jury. It is difficult then to see why a proceeding to take land in virtue of the government's eminent domain and determining the compensation to be made for it is not, within the meaning of the statute, a suit at common law when initiated in a court. It is an attempt to enforce a legal right." Scott v. Lasell, 71 Iowa, 180; Boom Co. v. Patterson, 98 U. S. 403; Searl v. School Dist. No. 2, 124 U. S. 197; Banigan v. Worcester, 30 F. R. 392; Simplot v. Chicago, etc. R'y Co. 5 McCrary, 158.

[1] Mo. Pac. R. R. Co. v. Carter, 85 Mo. 448; Dotson v. Sibert, 4 Bibb, 464; Commissioners v. Thompson, 18 Ala. 694; Damrell v. Bd. Supervisors, 40 Cal. 154; Com. v. Tarver, 25 Ala. 480; Wooster v. Great Falls Co. 39 Me. 246; Casey v. Kilgore, 14 Kan. 478; Sutherland v. Holmes, 78 Mo. 399.

[2] Tharp v. Witham, 65 Iowa, 566. The legislature, in absence of a constitutional provision giving a right of jury trial, may fix the tribunal for assessing damages as it pleases, provided it be impartial and the parties interested have opportunity to be heard. Rhine v. McKinney,

ceedings differ in their nature, and are sometimes denominated proceedings *in rem*. This, however, depends on the mode in which they are conducted; at best they cannot be said to be more than proceedings *quasi in rem*.

§ 180. Method of acquiring jurisdiction.— The mode of acquiring jurisdiction in this class of proceedings necessarily varies in different states, and often there is a variance in the same state, depending upon the particular tribunal that has the power to condemn, the nature of the right asked for, the purpose to which the property is to be applied, whether a railroad, highway, street, drain or mill-race. Where the statute requires a petition to be filed before the tribunal having jurisdiction, its filing is indispensable and jurisdictional.[1] It has

53 Tex. 354; Koppikus v. State Capitol Com. 16 Cal. 248; Langford v. Co. Com. 16 Minn. 375; Bruggerman v. True, 25 Minn. 123; Uhrig v. St. Louis, 44 Mo. 458; Zimmerman v. Canfield, 42 Ohio St. 463; Wurts v. Hoagland, 114 U. S. 606; United States v. Jones, 109 U. S. 513; Gamble v. McCrady, 75 N. C. 509. Costello v. Burke, 63 Iowa, 363: "It is true that the proceeding to appropriate the land is in the nature of a proceeding *in rem*. The owner of the property is made a party only for the purpose of giving him an opportunity to assert his claim for damages, and, if he neglects to assert such claim when the opportunity to assert it is given him in the manner provided in the statute, the appropriation may be made without any regard to the question of damages. Dunlap v. Pulley, 28 Iowa, 469; Wilson v. Hathaway, 42 id. 173; Hanrahan v. Fox, 47 id. 102." Such proceedings are in their nature civil actions, but the owner of the thing may be beyond the jurisdiction, and he may be notified by publication or by posting and the like. It is correct to treat them as civil proceedings. See Colorado Midland R. R. Co. v. Jones, 29 Fed. Rep. 193; Bryant v. Glidden, 36 Me. 36; Bass v. Elliott, 105 Ind. 517; Warren v. First Div. of St. P. & Pac. R. R. Co. 18 Minn. 384.

[1] State v. Otoe Co. 6 Neb. 133: "Section 20 provides that: 'Upon the presentation of a petition signed by at least ten land-holders, residents of the county, after notice given as provided in the preceding section, the board of county commissioners shall proceed to hear the parties interested in the case,' etc. In the case at bar the records fail to show when or where the notices were posted. But it does appear that two of the notices were signed by but one person. The statute requires those who are about to apply to the county commissioners for the opening of a new road, or the discontinuance of a road heretofore established, to give notice. This provision of the statute requires the notices to be signed by at least ten land-holders and residents, and the same land-holders and residents who sign the notices must sign and present the petition to the county commissioners. Proof of posting the notices should be made by affidavits of the party posting the same, stating when, where, and by whom the notice was posted. In Robinson v.

even been held, and correctly, that where the statute makes no provision for the filing of a petition invoking jurisdiction, still an application in writing should be made; in some matters it seems that a written application is not necessary; but such application is, in all cases, the better and safer practice.[1] Where the statute requires that the petition should be signed by a majority of the resident lot-holders of a street to be extended, or a majority interested, or other particular requisites, the provision is jurisdictional.[2] The petition should state suf-

Mathwick, 5 Neb. 255, this court held that in the location of a county road the commissioners have no jurisdiction, unless the petition mentioned above be presented after due notice thereof has been given. It is also held that 'it is essential that all the facts necessary under the statute to authorize their action in any given case be affirmatively shown.' No notice having been given in the manner provided by law, the county commissioners had no jurisdiction of the case." State v. Berry, 12 Iowa, 58; State v. Morse, 50 N. H. 8; Vail v. Morris & Essex R. R. Co. 21 N. J. L. 189.

[1] Kroop v. Forman, 31 Mich. 144; Hawkins v. Justices, etc. 12 Lea, 351. But see State v. Barlow, 61 Iowa, 572; Tubbs v. Ogden, 46 Iowa, 134; Richman v. Supervisors, 70 Iowa, 627.

[2] Mulligan v. Smith, 59 Cal. 206: "But it is urged that, as a petition sufficient upon its face was presented, and as the mayor to whom it was presented certified it to be in all respects in accordance with the statute, the defendant is now estopped from questioning the validity of the petition, or of any of the proceedings under which his property has been assessed and sold, first, by the certificate of the mayor, and secondly, by the judgment of the county court in confirming the report of the board of public works, under section 7 of the act. The statute required the petition to be made to the mayor, but he was charged with no duties in connection with it. He was not authorized to enter into any investigation of the frontage as represented by the petition, or to adjudicate its sufficiency, or to make any record in reference to it. He did append to it a certificate, but this certificate was unauthorized, and it is difficult to see how the unauthorized certificate to a document of a ministerial officer constitutes an estoppel. But it is urged that while the statute has only, by direct terms, conferred power upon the mayor to decide upon the sufficiency and validity of the petition, he of necessity had such power, because the statute required that it should be presented to him; and, as it is not to be presumed that the legislature intended a vain thing, it must be inferred that the officer to whom it was presented was authorized by the statute to determine whether it was in accordance with the statute or not, and that his determination of the fact was in the nature of an adjudication. But, even if that were so, the adjudication of the question would not be conclusive. A property owner would have the right to rebut it as evidence, when called upon for the first time to defend his rights to property affected by the proceeding of which the petition was the initiative, unless the statute provided for giving him notice of the presentation of the petition

ficient facts to give jurisdiction; at least a substantial compliance with the statute should be set forth.[1] A description

and notice was in fact served upon him." Lynde v. The County, 16 Wall. 6; Sharp v. Johnson, 4 Hill, 92. The decision of the council holding that a majority of property owners on a street have signed is not conclusive. Roberts v. Easton, 19 Ohio St. 78. *Contra*, see Ely v Board Com. 112 Ind. 361. See to the jurisdictional point the following cases collected by Mr. Lewis, in his work on Eminent Domain, section 347, notes 1 and 2: Bradford v. Cole, 8 Fla. 263; Warne v. Baker, 35 Ill. 382; Forsythe v. Kreuter, 100 Ind. 27; Com. of Wabaunsee Co. v. Muhlenbacker, 18 Kan. 129; Shaffer v. Weech, 34 Kan. 595; Whiteford v. Judge, 53 Mich. 130; Frost v. Leatherman, 55 Mich. 33; Blize v. Castlio, 8 Mo. App. 290; Jefferson Co. v. Cowan, 54 Mo. 284; Whitely v. Platte Co. 73 Mo. 30; Zimmerman v. Snowden, 88 Mo. 218; Doody v. Vaughn, 7 Neb. 28; Matter of Highway, 3 N. J. L. 491; Road in Sussex and Morris, 13 N. J. L. 157; Hewes v. Andover, 16 Vt. 510; Howe v. Jamaica, 19 Vt. 607; Williams v. Holmes, 2 Wis. 129; Damp v. Dane, 29 Wis. 419. In Howe v. Jamaica, *supra*, it was held the petition could be amended so as to show the requisite facts in this respect. See, also, *contra*, Keyes v. Tait, 19 Iowa, 128; Snoddy v. County of Pettis, 45 Mo. 361.

[1] Raymond v. Co. Com. 63 Me. 112; McCollister v. Shauey, 24 Iowa, 362; Stevens v. Bd. of Sup. 41 Iowa, 341. Spofford v. Bucksport R. R. Co. 66 Me. 26: "But, in the exercise of the right of eminent domain, a grant by the legislature to a corporation to take private property as for public uses, being in derogation of the common-law right of the citizen to hold and enjoy his property, is to be construed strictly; and, to justify its taking, it must be shown that all the provisions of the statute in that respect have been fully complied with. This rule of construction is so well settled as to need no citation of authorities. Another rule of construction, applicable to this statute, is that in all grants, made by the government to individuals, of rights, privileges and franchises, the words are to be taken most strongly against the grantee, contrary to the rule applicable to a grant from one individual to another. Another rule of construction is that, in construing a statute, all its parts are to be considered and such a construction adopted as will give force and effect to all its clauses, unless they are clearly repugnant to each other. 'But after all,' says Shaw, C. J., in Cleaveland v. Norton, 6 Cush. 380, 'the best ground of exposition is to take the entire provisions of the act and ascertain, if possible, what the legislature intended.' . . . We think it clear that the statute gives the railroad commissioners jurisdiction only in cases of disagreement between the parties as to the necessity and extent of the real estate to be taken for side-tracks, depots, wood sheds, repair shops and car, engine and freight houses, and that they have the power only to determine the necessity and extent of the real estate to be taken for those purposes, having in view the reasonable accommodation of the traffic and appropriate business of the corporation. . . . The next question that is presented is, had the railroad commissioners jurisdiction to act on the petition presented to them by the Bucksport & Bangor Railroad Com-

of the property to be taken should be given with reasonable certainty as provided by statute.[1] Where the particular loca-

pany by virtue of which they acted in condemning the land of the petitioner? The railroad commissioners are a tribunal created by statute, and their jurisdiction is given by statute. The petition presented to them is the foundation for their action. They obtain jurisdiction only when the petition presents a case within the provisions of the statute. Scarborough v. Co. Com. 41 Me. 604; Goodwin v. Co. Com. 60 Me. 328. The petition in this case does not present a case within the provisions of the statute. To give the commissioners jurisdiction the petition should contain a description of the estate which the corporation claims to take, naming the persons interested in it, with averments that the corporation claims to take it for some one or more of the purposes specified in the statute, and that the parties do not agree as to the necessity and extent of the estate described, to be taken for the purpose or purposes named. The petition does not contain these averments, neither in form nor substance. It starts out with the allegation 'that said corporation and Frederick Spofford of Bucksport, in the county of Hancock, do not agree as to the necessity and extent of the real estate to be taken for side tracks and buildings for said road.' This clause contains the only allegations of a claim by the corporation to take real estate for the purpose for which it claims to take it, and of disagreement as to the necessity and extent of the real estate to be taken. It does not appear what estate the corporation claims to take, nor does it appear that it claims to take any estate for one or more of the purposes named in the statute, and that the parties disagree as to the necessity and extent of the estate to be taken for such purpose. The allegation is that they 'do not agree as to the necessity and extent of the real estate to be taken for side tracks and buildings for the road.' What buildings? There is no building specified. It does not appear that the corporation claims to take it for any building named in the statute. The disagreement is alleged to be as to the necessity and extent of the estate to be taken for buildings for said road. It may have been for a bank, store, dwelling-house, foundry for making their castings, or car and locomotive works." Clay v. P. C. I. Co. 34 Mich. 204; Byron v. Blount, 97 Ill. 62; In re Grove St. 61 Cal. 438. Allegations of petition must be certain and unequivocal. Hays v. Campbell, 17 Ind. 430. When particular statements or a particular thing is required to be stated, the omission is fatal. Powers v. Irish, 23 Mich. 429. The statute must be complied with as to everything necessary. Morton v. Franklin Co. 62 Me. 455. A general description of the persons as owners, agents or occupants without a description of the class is good.

[1] The petition should describe the property sufficiently so that a skilled person could locate it. Jackson v. Rankin, 67 Wis. 285; Quincy R. R. Co. v. Kellogg, 54 Mo. 334; Turnpike Co. v. Am. News Co. 43 N. J. L. 381; Paine v. Woods, 108 Mass. 160. For insufficient description see McDonald v. Wilson, 59 Ind. 54; Smith v. Weldon, 73 Ind. 454; Bennett v. Drain Com. 56 Mich. 634; Null v. Zierl, 52 Mich. 540.

tion is to be determined by the board of commissioners or by the tribunal appointed by law, and not by the petitioners, then a general description in the petition is sufficient.

§ 181. Purpose of taking.— The petition should not only show with reasonable certainty what property is to be taken, but it should state the purpose for which it is to be taken. The statute only gives the right to take property for public

Meyers v. Brown, 55 Ind. 596. See Hughes v. Sellers, 34 Ind. 337. Matter of R. R. Co. 70 N. Y. 191: "The description of the first parcel of lands set forth in the petition, which the company seeks to acquire in this proceeding, is manifestly defective. The statute declares that the petition must contain a description of the real estate which the company seek to acquire, and this provision cannot be complied with unless there is such a description of the lands as will show its location and the boundaries thereof. The easterly course, along the wall of the brewery building, terminates at a point on the west line of Clinton street, where the same intersects the line between the lands of Mrs. Rau and the petitioner, and thence the boundary runs westerly along the north line of petitioner's land to Pitt street. It does not appear to what point on the west this point of intersection is to be extended, nor where the north line is, nor what the quantity or size of the piece of land intended to be embraced in the description. If the line runs directly west, it would run over the easterly line along the south wall of Mrs. Rau's brewery, only taking in about one foot in width for the last part of the line. If it runs to Pitt street at any other point, it does not appear to what point, if it be a triangular piece, it does not appear how much or what the precise size of the same is. In fact, the north line of the petitioner's land is not shown, and the boundaries on that left without any certainty as to the same, and to mere conjecture. It must be determined in some other manner than by the description in the petition. The reference to the deed does not remedy the defect, for it is by no means certain what land it conveyed, and even if it should, on production, show, it is not a compliance with the statute, which requires that the description should be contained in the petition. Without this the owner of land cannot know what portion of the lands is required, nor the commissioner what damages to appraise, nor the petitioner the precise boundaries of the land, if the same is acquired. In proceedings of this character extreme accuracy is essential for the protection of the rights of all the parties, and a failure to comply with the statute must lead to difficulty and embarrassment." Lewis on Em. Dom. sec. 350, notes 3 and 4; Com. v. County Com'rs, 8 Pick. 343; Westport v. County Com'rs, 9 Allen, 204; Matter of Public Road, 4 N. J. L. 31; State v. Shreve, 4 N. J. L. 297; State v. Northrop, 18 N. J. L. 271; Wiggin v. Exeter, 13 N. H. 304; Sumner v. County Com'rs, 37 Me. 112; Bryan v. Moore, 81 Ind. 9; Pembroke v. Co. Com. 12 Cush. 351; Matter of Highway, 16 N. J. L. 391. The last cases hold that the location should be sufficiently described to entitle the notice to be given to owners of the property affected.

use; and the use for which the state desires to appropriate the property must be shown, so that a clear right to condemn will appear under the particular statute pursuant to which the condemnation proceeding is instituted.[1]

Where the owner has a special or partial title, the nature thereof should be shown; but the defendant is not concluded, and may always show his real interest.[2] The nature of the

[1] For indefinite descriptions see: Toledo, etc. R. R. Co. v. Munson, 57 Mich. 42; Hayford v. Co. Com. 78 Me. 153. This last case holds that the description of a road as commencing at a farm named, at terminus of the county road, and running through certain townships named, and passing between Cross Lake and Mud Lake, was quite too indefinite. So when several surveys are described, without designating which one is sought to be condemned, such description has been held insufficient. Ft. W. & D. C. R. R. Co. v. Hogsett, 1 Tex. App. Civ. Cas. 200. So the use of the word "about," connected with the distance, has been held insufficient. Midland R. R. Co. v. Smith, 109 Ind. 488. See, also, Bennett v. Drain Com. 56 Mich. 634; McDonald v. Wilson, 59 Ind. 54. When a petition is for a private road, it must show that it is such a road, in all respects, as the statute provides for the location of. Powell v. Hitchner, 32 N. J. L. 211. See Bottoms v. Brewer, 54 Ala. 288. Curtis v. Pocahontas Co. 72 Iowa, 153: "Before a highway can be lawfully established, a petition asking the establishment of such highway must be presented to the board of supervisors. Until this is done the board has no jurisdiction or power to establish a highway, and if it does so its action is absolutely void. It will be observed that the petition did not ask that a highway be established, but the relief asked was that 'the highway be open for travel.' Our attention has not been called to any statute authorizing the board to order or direct an established road to be opened, and our impression is that there is no such statute, but that it is the duty of the highway supervisors to open all established highways. But be this as it may, the petition did not ask that a highway be established, and therefore the board exceeded its jurisdiction and power when it proceeded to do so, and what it did is void and without effect. It is obvious, we think, that the board of supervisors cannot, by reason of the doctrine of estoppel, obtain jurisdiction over a subject-matter when such jurisdiction has not been invoked in the manner provided by law. Therefore, the acts and conduct of the auditor and board do not estop the county from setting up the defense it did. The plaintiff is not entitled to damages, for the simple reason that no highway was established by the board of supervisors in 1886, or since 1871. Whether one was legally established at the last-named period we are not called upon to determine." Generally, see: Leath v. Summers, 3 Ired. L. 108; Corey v. Swagger, 74 Ind. 211; Ayres v. Richards, 38 Mich. 214; Colville v. Judy, 73 Mo. 651; Windsor v. Field, 1 Conn. 279.

[2] Brisbine v. St. P. & S. C. R. R. Co. 23 Minn. 127: "Under these provisions commissioners were appointed upon the *ex parte* application of the company, and although the company

injury or damage need not be stated specifically, although it has been otherwise held in some cases.[1] Jurisdictional defects in a petition cannot be waived by going to trial; they may

was required to state in its petition 'a general description of the land, property and real estate' sought to be taken and the names of the owners, if known, yet it was not requisite that they should receive, nor did they in fact have, any notice of such application, and, hence, had no opportunity upon the hearing to raise any question as to the correctness of the company's statement in regard to the ownership of the property. The first opportunity the claimant had to be heard in the proceedings was before the commissioners, of whose meeting for the purposes for which they were appointed he had notice; and as it is made the duty of the commissioners to hear the allegations and testimony of all parties interested, and to make a separate assessment of damages in favor of each owner, it necessarily follows that where, as in this case, the company has not in its petition specified the separate interest and estate of each, the very first inquiry to be made and settled by them is the one relating to the extent and character of such estate and interest, in order to determine the damages accruing to its owner, and, in so far as an inquiry into the title is necessary to the determination of this question, it is a proper matter for the consideration of the commissioners. So, in case the claimant's estate and interest is incorrectly stated in the petition, he is not thereby concluded and prevented from asserting and proving his real claim, interest and estate, although, as was held in Knauft v. St. Paul, S. & T. F. F. R. R. Co. 22 Minn. 173, and in Rippe v. Chicago, D. & Minn. R. R. Co. 23 Minn. 18, the company would be estopped from disputing such his claim and title on an appeal from an award made upon that basis by the consent of both parties. Whenever, therefore, either by an indefinite statement in the petition as to the interest of the claimant in the property, or by one not accepted by him as true before the commissioners, it becomes necessary for them to inquire into and decide the question of title or interest as incidental to the question of damage. It is proper matter for their consideration, and their decision thereon is reviewable upon appeal in the district court." See Nelson v. Butterfield, 21 Me. 220; Schoff v. U. P. C. R. R. Co. 57 N. H. 110.

[1] Drury v. Midland R. R. Co. 127 Mass. 571. Lake v. Loysen, 66 Wis. 427: "The claim for damages and the demand for judgment are unobjectionable. It was not necessary to state in the complaint the dimensions of the defendant's dam, or the excess thereof above a reasonable height, or the times in the year when the same should be left open. Perhaps it would have been better pleading had the complaint stated the manner in which the plaintiff's land, not flowed or water-soaked by means of the dam, was injured, and, had the circuit court required her to make her complaint more definite and certain in that particular, probably this court, on appeal, would have affirmed this order. But the *gravamen* of the action is the raising of the water in the stream and thereby overflowing or soaking the plaintiff's land. The effect thereof upon the other lands of the plaintiff is merely an additional element of damage which, if elim-

always be taken advantage of at any stage of the proceedings.[1]

§ 182. Just compensation and damages.— It is an elementary principle of law, that, where private property is taken for public use, just compensation shall be made to the owner by the party taking the same; and it does not matter whether the constitution of the state makes provision for the payment of such compensation or not; the rule is the same: payment must be made to the owner.[2] The rule may be laid down as

inated from the case, does not defeat the action." *Contra*, Canal Co. v. O'Brien, 4 Rawle, 358. See Forsythe v. Kreuter, 100 Ind. 27. It is an elementary rule that the necessary facts showing jurisdiction must always appear before the court.

[1] Mulligan v. Smith, 59 Cal. 206.

[2] Henry v. D. & P. R. R. Co. 10 Iowa, 543: "The right to take private property for public use is expressly recognized by the constitution and laws of this state. The language of the constitution governing at the time of this assessment was: Private property shall not be taken for public use without just compensation. Sec. 18, art. 1. The language of the corresponding section in the present constitution is: 'Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury.' It is very clear that under the new constitution it would be competent for the legislature to provide the means or method of ascertaining the land-owner's damages, to be paid at some time after the appropriation of the land, or at any other time after the damages should be assessed. The just compensation referred to therein must be made before or secured to be made as soon as the jury shall determine the amount, and it would not be competent for the legislature to provide for the postponement of the same to a time after such assessment. . . . The plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property against any claim or demand of the company to appropriate the same to their use or the use of the public. To be thus protected and thus secure in the possession of his property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy. And yet for the public weal, for the use of the public, a right remains in the government, or the people in their sovereign capacity, to take the property of the private citizen, or such portion as may be necessary, he being compensated. In the exercise of this right, the owner of the property should, as far as consistent with the exercise of this right of eminent domain, be strictly protected and every substantial requirement of the law be fully complied with. . . . It was never intended by the constitution nor by the law that the corporation might rightfully enter upon the land, grade the road and run the same, and that the owner of the land should be turned over for his damages as assessed to his execution against the property of the company. Private property, and

established, that all statutes authorizing the taking must provide for compensation, or they will be inoperative, so far as they seek to condemn property. The owner should have the common-law remedy for trespass, or a court of equity would

the right of the owner to be protected in its use and enjoyment, is too safely guarded in this country to permit such a construction for a moment." Lewis on Em. Dom. sec. 10: "It is a very interesting question, whether in those states whose constitutions contain no provision in regard to taking private property for public use, the legislature is under any restraint whatever in the exercise of the power. But this question has lost most of its practical interest, from the fact that all states except one now have an express limitation in their organic law touching the exercise of this power. The courts of nearly all the states which are, or have been, without such a limitation have held that the limitation itself was simply declaratory of certain great fundamental principles of natural justice and equity which were as binding and obligatory upon the legislature as though expressly incorporated into the written constitution." Spencer, J., in Bradshaw v. Rodgers, 20 Johns. 103, speaking of these constitutional provisions, says: "They are declaratory of a great and fundamental principle of government, and any law violating that principle must be deemed a nullity, as it is against natural right and justice." S. C. 20 Johns. 735 (1823). In Harness v. The Chesapeake & Ohio Canal Co. 1 Md. Ch. 248 (1848), it was said that, independent of constitutions, "there was a principle of right and justice inherent in the nature and spirit of the social compact, which restrained and set bounds to the authority of the legislature, and beyond which it could not be allowed to pass — that principle which protects the life, liberty and property of the citizen from violation in the unjust exercise of legislative power." And see Martin et al. Ex parte, 13 Ark. 198; Cairo & F. R. R. Co. v. Turner, 31 Ark. 494; Doe v. Georgia R. R. & B. Co. 1 Ga. 524; Young v. McKenzie, 3 Ga. 31; Parham v. Justices of Decatur County, 9 Ga. 341; Loughbridge v. Harris, 42 Ga. 501; Matter of Highway, 22 N. J. L. 293; Johnston v. Rankin, 70 N. C. 550; Petition of Mt. Washington Road Co. 35 N. H. 134, 141, 142; Eastman v. Amoskeag Mfg. Co. 44 N. H. 143, 160; State v. Franklin Falls Co. 49 N. H. 240, 251; Piscataqua Bridge Co. v. N. H. Bridge Co. 7 N. H. 35, 66, 70; Polly v. Saratoga R. R. Co. 9 Barb. 449; United States v. Jones, 109 U. S. 513, 518; B. & O. R. R. Co. v. P. W. & Ky. R. R. Co. 17 W. Va. 812, 841; Challiss v. A. T. & S. F. R. R. Co. 16 Kan. 117; Dist. of City of Pittsburgh, 2 W. & S. 320; Water-Works of Indianapolis v. Burkhart, 41 Ind. 364; Winona & St. Peter R. R. Co. v. Waldron, 11 Minn. 539. In the latter case the court say: "The right of eminent domain is not conferred by the constitution, but, if affected at all, is limited thereby, and only to the extent of the limitation can the citizen obtain any redress." Again, in Harvey v. Thomas, 10 Watts, 63, "The clause by which it is declared that no man's property shall be taken or applied to public use without the consent of his representatives and without just compensation is a disabling, not an enabling, one, and the right would have existed in full force without it."

enjoin the occupation of the property until compensation is made.[1] This right to compensation applies to all classes of property, even wild lands sought to be taken for public roads and highways, for other lands not taken are equally benefited, and not injured.[2] And the rule is, that when the land

Trustees of Iowa College v. Davenport, 7 Iowa, 213. See Ragatz v. Dubuque, 4 Iowa, 343, holding, where no provisions are made to assess damages before a legal tribunal, and no provisions made for an appeal, the injured party may sue in trespass. The compensation under the statute is for damages resulting from taking of the land. The award, therefore, must be taken to be for so much as the property of the claimant has been thereby reduced. Dunlop v. York, 16 Grant (Canada), 216–223; Noll v. Dubuque, B. & M. R. R. Co. 32 Iowa, 66.

[1] Wheelock v. Young, 4 Wend. 647; White v. Wabash, St. L. & P. R. R. Co. 64 Iowa, 281, holding where the money was deposited by the railway company with the sheriff and the sheriff did not pay the plaintiff, that he was agent of the railway company and such company must pay again. Cherokee v. S. C. & I. F. Town Lot Co. 52 Iowa, 279. Benefits accruing by building the road, laying out the street, and the like, cannot be set up against damages or estimated in the settlement. Britton v. D. M. O. & S. R. Co. 59 Iowa, 540.

[2] Warner v. Hennepin Co. 9 Minn. 141: "But we cannot forbear remarking that there was one proposition involved in the discussion which appeared to be well sustained by reason, and commended itself very strongly to the approval of our judgment. We refer to the position taken by the plaintiff's counsel that, where the legislature by special act authorizes or requires a public road or highway to be made or established, and provides no means of paying for the same, or for ascertaining or paying the damages occasioned thereby, or for the property taken, the reasonable presumption is that it is intended that such damages shall be ascertained, assessed and paid, and such improvements made, under the provisions of the general laws appertaining to the subject." Ward v. Peck, 49 N. J. L. 43: "It thus appears that authority is here given to the officer to cut or make a drain for the purpose mentioned over land where no ditch or drain exists. This is what was done in the present case, and the only question, therefore, is whether the section quoted, so far as relates to this matter, is still in force in this state. There can be no doubt that such an appropriation of land as that just described is a taking of private property for public use. By laying the drain, the public acquire a right to a perpetual easement in the property burdened, and the owner *pro tanto* has been deprived of his property. The right to enter upon the property and clean out a drain already legally in existence would obviously not be a taking of the property, and it would seem that no doubt could be entertained that by force of the sanction contained in the legislative clause just cited such act would be altogether lawful. But the inquiry is, How can the land of the citizen be permanently applied to the public use unless upon the basis of compensation being made to him? The authority conferred upon the overseer in the

is sought to be taken, the compensation must be made before the land can be appropriated; but as litigation may arise as to the amount of compensation, or follow the assessment, and great embarrassment result from the delay, the rule generally acted on is that the person taking shall pay into court or to some designated officer the amount awarded by the tribunal authorized to fix the damages, and in case the owner appeals and obtains a more favorable judgment, pay in the balance finally awarded. The compensation need not precede the entry if the amount needed is certainly secured and ready to be paid when the damages are ascertained.[1] This rule has been

section referred to appears to have originated in colonial times, and has always been an accompaniment of the road act, and it is deemed that in regard to the feature now in question it is to be taken as a part of the power given by the old law to sequester, without rendering any equivalent for it, so much private property as was requisite for the public roads. The power to appropriate the land for a drain was supplementary to the power to take the land for the road itself. Under the prevalence of the ancient laws compensation was to be made for neither of such appropriations. But by section 16 of article 1 of the constitution of this state, adopted in the year 1844, it is declared 'that private property shall not be taken for public use without just compensation, but land may be taken for public highways as heretofore until the legislature shall direct compensation to be made.' Since the introduction of this constitutional provision the legislature has directed that when land be taken for public roads it shall be paid for." See Smith v. Inge, 80 Ala. 283. In State v. Seymour, 35 N. J. L. 47, it is held that when the constitution provided that "lands may be taken for public highways as heretofore, until the legislature directs compensation to be made," that the legislature having once provided for compensation could not recede from its action and reimpose this servitude upon private property. It has also been held that private ways, though in reality public, are not within the exception. See Perrine v. Farr, 22 N. J. L. 356; Plank Road Co. v. Thomas, 20 Pa. St. 91.

[1] Where the county, state or other municipal corporation is a party, and the compensation is easily and readily to be obtained, the order of payment has been held sufficient and possession could be taken. Waller v. Martin, 17 B. Mon. 181; Evansville R. R. Co. v. Grady, 6 Bush, 144; Zimmerman v. Canfield, 42 O. St. 463; Potter v. Ames, 43 Cal. 75; Sanborn v. Belden, 51 Cal. 266. But see Brady v. Bronson, 45 Cal. 640; Cal. P. R. R. Co. v. Cent. P. R. R. Co. 47 Cal. 528. Illinois cases are the reverse. Hall v. People, 57 Ill. 316; Phillips v. South Park Com. 119 Ill. 626; C., St. L. & W. V. V. Co. v. Gates, 120 Ill. 86. In the Illinois case first cited above the court say: "No man can be compelled to part with his property without just compensation. This is a constitutional right that he cannot be deprived of by any statute." See very extended notes on this subject, Lewis on Em. Dom. sec. 457, and cases from all states. Denver City Co. v. Mid-

extended in some states so far that the property may be occupied before the compensation is either paid or secured, provided the statute makes provision for ascertaining it, and requires payment by the party taking, even where the taking is by a private corporation or individual; but such is not the better rule.[1] I give below in the note the cases, or many of them, showing both the rule and the variation from it. Just compensation includes damage to the remainder of the property not taken. There is little dispute over this rule.[2] The

daugh, 12 Colo. 434; Com. Court v. Bowie, 34 Ala. 462, 467, 468; Conn. R. R. R. Co. v. Co. Com. 127 Mass. 50; 34 Am. Rep. 338, 342. But a payment to be made from the earnings of a railroad company is not adequate and complete security or compensation. Conn. R. R. R. Co. v. Co. Com. *supra*. See Hawley v. Harrall, 19 Conn. 142; State ex rel. Moody v. R. R. Co. 20 Fla. 616; Powers v. Armstrong, 19 Ga. 427; Prather v. Jeffersonville R. R. Co. 52 Ind. 16; Riche v. Bar Harbor Water Co. 75 Me. 91; Briggs v. Cape Cod, etc. Canal Co. 137 Mass. 71; State v. McIver, 88 N. C. 686; Sage v. Brooklyn, 89 N. Y. 189.

[1] See Nichols v. S. & K. R. R. Co. 43 Me. 356, holding the legislature may authorize a temporary exclusive occupation of land of an individual, incipient to the acquisition of title to it, or an easement thereon for public use. But such title must be perfected in a reasonable time after occupation of the land, by payment or tender of the required compensation, or the occupation will become unlawful. Three years will not be considered an unreasonable time. Hankins v. Lawrence, 8 Blackf. 266; Prather v. Jeffersonville R. R. Co. 52 Ind. 16; State v. McIver, 88 N. C. 688. Such a rule might well apply where the state, county, city, town or school district asks the condemnation and the means to pay are at hand. Talbot v. Hudson, 16 Gray, 417; Great Falls Mfg. Co. v. Garland, 25 Fed. Rep. 521; Haverhill Br. Proprietors v. Com. 103 Mass. 120; State v. Messenger, 27 Minn. 119; Application of Mayor of N. Y. 99 N. Y. 569; Brock v. Hishen, 40 Wis. 674; Long v. Fuller, 68 Pa. St. 170. But read Keene v. Bristol, 26 Pa. St. 46, holding that where the power of taxation in a municipality is so limited as to be inadequate to pay the damages within a reasonable time, an injunction will be granted unless security is given. Sage v. Brooklyn, 89 N. Y. 189; Conn. B. R. R. Co. v. Co. Com. 127 Mass. 50. See Buffalo Bayou R. R. Co. v. Ferris, 26 Texas, 588, holding: "The property must be paid for when taken, or within a reasonable time thereafter, and the making of compensation must be as absolutely certain as that the property is taken." A bond with surety has in some states been held insufficient. Sanborn v. Belden, 51 Cal. 266. See Brickett v. Haverhill Co. 142 Mass. 394; Moody v. Jacksonville R. R. Co. 20 Fla. 597; Thompson v. Grand Gulf R. R. Co. 3 How. (Miss.) 240; Pearson v. Johnson, 54 Miss. 259; Piscataqua Br. Co. v. N. H. Br. Co. 7 N. H. 35.

[2] Hollingsworth v. D. M. & St. L. R'y Co. 63 Iowa, 445: "By the condemnation proceedings, defendant acquires the right to the exclusive use of the surface of the lot, and the condemnation is made on the theory

measure of damages depends upon the statute and constitution of the state, and, if the entire land is taken, the value at the time of taking is the measure of damages; if only a part is taken, the value of the property immediately before and

that this use of the surface will be perpetual. So far as can be determined, at present, then, the reversionary right remaining in plaintiffs is of no value whatever. And the measure of damages is the full market value of the lot." Where only a part is taken the measure of damages is the difference in value of the property before the taking and after. Cooley, Const. Lim. 567. See Bangor R. R. Co. v. McComb, 60 Me. 295: "This exercise of the right of eminent domain is, in its nature, in derogation of the great and fundamental principle of all constitutional governments, which secures to every individual the right to acquire, possess and defend property. As between individuals, no necessity however great, no exigency however imminent, no improvement however valuable, no refusal however unneighborly, no obstinacy however unreasonable, no offers of compensation however extravagant, can compel or require a man to part with an inch of his estate. The constitution protects him and his possessions, when held on, even to the extent of churlish obstinacy. It is only when the sovereign power declares that a public exigency, to carry out a public purpose, requires that the individual right to possess must yield to the higher demands of the sovereign power, that private property can be taken without consent. And even this right to take is not affirmatively given in the bill of rights, but is necessarily inferred. The section first gives an emphatic protection to private property, even against the public and the sovereign, — 'private property shall not be taken.' It then qualifies this absolute negation by excepting the cases where a public purpose and a public exigency concur in requiring or justifying the exercise of the right of eminent domain. . . . If personal property is taken from the possession of the owner and converted to the use of the public, the value of the thing taken, at the time of the taking, would be the just compensation required. If a man's horse is taken and it goes from his possession, he has no longer any connection with the subsequent use or appropriation of the property. It can no longer affect him in the use or value of his remaining property. But not so with land, unless the whole lot is taken. The land remains unmoved, and in various ways the taking of a part may injure the former owner beyond the mere value of so much land. The effect of the location of the part taken, upon the remaining portion, may be such as to render it of very little value. It may leave only small gores, or parts incapable of profitable use. Or it may disfigure the lot, so that it would be worth but little, although the extent of the part remaining might be greater than of the part taken. Another, and often a more serious injury, is in the use to which the land taken is to be appropriated. If for a common highway the use might be much less injury to the remaining land than if for a railroad. . . . The jury were instructed to exclude 'merely speculative or conjectural damages, and that they must assume that the corporation will per-

after the taking. But there must be excluded from the estimate those benefits which the owner receives in common with his neighbor, or the sum of money paid must be such as makes him whole, and leaves him in as good a situation as his neighbor whose land has not been taken.[1] The rule in Iowa is

form its obligations and operate their road in conformity with the requirements of law. The direct depreciation of this land in consequence of the location of the road over it is to constitute your measure of damages.' The corporation requested the instruction that the jury 'are not authorized to assess any damages for all inconvenience arising from the sounding of whistles, the ringing of bells, the rattling of trains, the jarring of the ground, and for smoke, which are common to all the inhabitants and proprietors along the line of railroad.' The presiding officer instructed the jury that the inconveniences named in the request, to constitute elements of damage in this case, must be the result of the location of the road over the premises in question. That the whistling, ringing of bells and other matters named, at a distance, and which constituted a common annoyance, were not to be considered. We see no ground to except to the instruction, qualified as it was in the giving, and also qualified by a reference to the former part of the charge, by which all common and indirect damages were excluded. . . . The jury were instructed to allow interest on the damages found, after the time when the land was taken by the corporation. We see no legal objection to this rule. The respondent's land was taken from him and his compensation has been detained from him by the acts and proceedings of the corporation. Reed v. Hanover B. R. R. Co. 105 Mass. 303."

[1] Cooley, Const. Lim. (5th ed.) 567: "The question, then, in these cases, relates first to the value of the land appropriated; which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it. Second, if less than the whole estate is taken, then there is further to be considered how much the portion not taken is increased or diminished in value in consequence of the appropriation. But, in making this estimate, there must be excluded from consideration those benefits which the owner receives only in common with the community at large in consequence of his ownership of other property, and also those incidental injuries to other property such as would not give to other persons a right to compensation, while allowing those which directly affect the value of the remainder of the land not taken, such as the necessity for increased fencing and the like. And, if an assessment on these principles makes the benefits equal the damages, and awards the owner nothing, he is nevertheless to be considered as having received full compensation, and consequently as not being in position to complain." Ham v. Wisconsin R. R. Co. 61 Iowa, 716; Britton v. D. M., O. & S. R. R. Co. 59 Iowa, 540; Sater v. B. & M. P. P. R. Co. 1 Iowa, 386; Frederick v. Shane, 3 Iowa, 254; Daniels v. C. & N. W. R. R. Co. 35 Iowa, 129. Not unconstitutional to provide for appeal from the

different because this very wise provision is made by her constitution (art. 1, sec. 18): "Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken." The decisions under this clause are given below.[1]

§ 183. What is included in the settlement of damages.— First among the questions to be considered is, whether benefits to the land caused by its enhancement in value because of the improvement being constructed, advantages derived by the increased facilities to market, conveniences for travel, opening the country for a more rapid settlement, and causing a more ready sale for the lands affected, should be considered. As we have seen, benefits cannot be considered under the constitution of Iowa.[2] Such also is the holding of the courts in Mississippi, where the act of the legislature provided that "the jury in estimating the damages, if for the ground occupied by said road, shall take into the estimate the benefits resulting to such owner or owners by reason of said road passing through or upon said land, toward the extinguishment of said claim for damages." This clause of the statute was held void.[3] There

sheriff's jury. Peterson v. Ferreby, 30 Iowa, 327; Tharp v. Witham, 65 Iowa, 566.

[1] White v. Wabash, etc. R. Co. 64 Iowa, 281; Des Moines v. Layman, 21 id. 153 (but see Sigafoos v. Talbot, 25 id. 214); Deaton v. Polk Co. 9 id. 594; Israel v. Jewett, 29 id. 475; Frederick v. Shane, 32 id. 254; Bland v. Hixenbaugh. 39 id. 532; Koestenbader v. Pierce, 41 id. 204; Britton v. Des Moines, etc. R. Co. 59 id. 540.

[2] See last note.

[3] Brown v. Beatty, 34 Miss. 239: The court held as follows: "The right of eminent domain is an inherent and essential element of sovereignty. It results from the social compact, and hence would exist without any express provision of the organic law upon the subject. In this commonwealth its existence is recognized in the bill of rights. And the only restrictions placed upon its exercise are, that private property shall not be taken or applied to public use without the consent of the legislature nor without just compensation being first made therefor. Bill of Rights, sec. 13. No question can be made in regard to the existence of the right. In the case before us, and in all similar cases, the sole inquiry is, whether the condemnation and appropriation of the land for the purposes and in the mode prescribed in the charter is the taking and application of private property to public use according to the true construction of the bill of rights. If the construction of the

is also a class of cases holding that the special benefits may

Mississippi Central Railroad were a mere private enterprise, in which the people of the state have manifestly no interest, the provisions of the charter under which the plaintiff's lands were taken are clearly unconstitutional. It would not, in that view, be an act of legislation done in the exercise of the right of eminent domain. It would, in effect, be a judicial sentence by which the property of one citizen would be taken from him and vested in others and therefore void. It is the object and primary duty of every commonwealth to promote the welfare and to secure the happiness of its members. And it is undoubtedly the right, as well as the duty, of the legislature to advance these objects by a wise and judicious exercise of its delegated authority. To facilitate and cheapen the transportation of the products of labor, and to increase the intercourse amongst the citizens, are amongst the means obviously best calculated to promote these objects. Railroads and similar works of internal improvement are the appliances best adapted to these purposes. Consequently, when the legislature deems such works expedient, the duty and right devolves upon it to make them, or to cause them to be made at the public expense. But even where such enterprises are engaged in by individuals under charters of incorporation, they are not the less undertakings in which the public have an interest. They are public works, intended to promote the interest of the community. The individual corporators, in the anticipated pecuniary benefit which may result to them, have an object and an interest distinct from that of the public. In that respect the enterprise is individual, and the corporation private. But the object and purpose of the incorporation are the public advantage. This gives to the work its public character. A corporation created by the legislature with a view to the construction of a work of public utility is the agency or means by which its intentions are designed to be carried into effect. When, therefore, the object justifies it, that is, when by means of an incorporated company it is proposed to construct any work of internal improvement, useful and beneficial to the public, and it is necessary to the completion of the work, all the authorities hold (and there seems upon principle no reason to doubt) that in the exercise of the right of eminent domain the legislature may, by law, provide for taking and applying private property to that purpose, a just and full compensation being first made to the owner therefor. According to which it is held, in the great majority of cases, that when the legislature has authorized the erection of works of internal improvement, deemed convenient and useful to the public, and a mode is provided by statute for the assessment and payment of damages resulting to individuals from the construction of such works, that parties injured are confined to the remedy prescribed which is substituted for the remedy which would otherwise exist at common law." London & N. R. R. Co. v. Bradley, 5 Eng. L. & Eq. 104; Knorr v. Germantown R. R. Co. 5 Whart. 256; Aldrich v. Cheshire R. R. Co. 21 N. H. 359; Stowell v. Flagg, 11 Mass. 364; Mason v. Kennebec & P. R. R. Co. 31 Me. 215; Calking v. Baldwin, 4 Wend. 667. Mode of ascertaining compensation to be made to owner, whose land is taken for public use. Henderson R. R. Co. v. Dickerson, 17 B.

be taken into consideration, not as to the value of the land

Mon. 173; S. C. 66 Am. Dec. 148, and cases cited in note 153. Offsetting resulting benefits. Id. This case is cited to the point that the owner is entitled, not only to the cash value of his land, but to indemnity for the damage done thereto, considering its relative possession to his other land and any other circumstances which may diminish or enhance that value. Robb v. Mayville, etc. T. Co. 3 Metc. (Ky.) 120; Elizabethtown, etc. R. R. Co. v. Helm's Heirs, 8 Bush, 683. See Isom v. Miss. Cent. R. R. Co. 36 Miss. 313; Penrice v. Wallis, 37 id. 183; N. O. R. R. Co. v. Moye, 39 id. 385. The compensation cannot be estimated in benefits thereafter to accrue from an improvement thereafter to be made, but the compensation must precede, not follow, the taking, and hence cannot be affected by anything that is to be done afterwards. Macon v. Patty, 57 id. 397, citing the principal case. The inquiry as to damages in a condemnation proceeding should not be confined to the land actually sought to be taken, but the damages to the entire tract caused by the taking of a portion of it should be considered. Kansas City, etc. R. R. Co. v. Story, 96 Mo. 611; Cedar Rapids R. R. Co. v. Ryan, 36 Minn. 546; S. C. 37 id. 38; Peck v. Sup. Short Line R. R. Co. 36 id. 343. Compare Bell v. Chicago R. R. Co. 74 Iowa, 343. The land-owner will be entitled to the value of the land actually taken without regard to any set-offs against his damages in the way of benefits accruing thereto. Harwood v. Bloomington, 124 Ill. 48; Ball v. Keokuk R. R. Co. 74 Iowa, 132. Compare Moran v. Ross, 79 Cal. 549. In Balfour v. Louisville R. R. Co. 62 Miss. 508, the court held the rule of damages was the difference in value of the whole tract before the taking and the remainder after the taking. See Bd. of Levee Com. v. Harkleroads, 62 Miss. 807. F. E. & M. V. R. R. Co. v. Whalen, 11 Neb. 590: "The damages based upon the supposed insufficiency of the culvert and the possible destruction of property by fire and otherwise, through the carelessness of the company's agents in operating the road, were too uncertain and remote to be taken into the estimate, and valuations of the land based in part thereon were entitled to no weight with the jury. King v. Iowa Midland R. R. Co. 34 Iowa, 458; Lehigh Valley R. R. Co. v. Lazarus, 28 Penn. St. 203; Patten v. N. C. R. R. Co. 33 id. 426; Fleming v. C. D. & M. R. R. Co. 34 Iowa, 353. Damages to be paid by the company upon the condemnation do not cover those caused by injuries resulting from negligence or unskilfulness in either the construction or the operation of the road. Del. L. & W. R. R. Co. v. Salman, 23 Am. Rep. 214; 10 Vroom, 299. And even if they were in fact included in the assessment, their payment would be no bar to future actions brought for such injuries. The damages for which the law provides, and proper to be included in the assessment for right of way, are simply those which it can be said with reasonable certainty the owner of the land will sustain by reason of its appropriation; in other words, such damages as are necessarily incident to the proper construction and careful management of the road, leaving injuries resulting from negligence to be compensated for by action whenever they occur. . . . As before stated, the owner of the land is entitled to recover, in any event, as one item of damage, the fair value of the portion actually taken. Wagner v. Gage Co. 3 Neb. 237. And in addition

actually taken, but considered in reference to the remainder left which is affected after the carving out of the right of way.[1]

to this, he should have allowed to him a reasonable compensation for whatever damage the evidence shows must necessarily be done to the residue of the tract from the proper construction and future careful operation of the road. Where the evidence shows that the land-owner will be specially benefited by the location of the road, such benefit may go to reduce the damages to the residue of the land, but cannot be set off against the value of the part actually taken. But those benefits which are common, and shared in by others as well, cannot be considered to reduce his damages." See affirming this rule: Shipley v. Baltimore R. R. Co. 34 Md. 336; Memphis v. Bolton, 9 Heisk. 508; R. R. Co. v. Tyree, 7 West Va. 693. Washburn v. M. & L. W. R. R. Co. 59 Wis. 376: "In the Barker case the trial court instructed the jury that they might deduct from the depreciation in the value of that portion of the plaintiff's lot not taken, resulting from the taking of the other portion thereof, the benefits accruing to the plaintiff by reason of the location of a depot on defendant's railroad near the lot. The instruction was: 'If there is in this location of the depot ground a benefit to this particular property, that benefit should be set off against the damages to his other property, even though it may also benefit some property immediately surrounding, but not benefit the whole people generally.' The only benefits claimed seem to be those resulting from the proximity of the lot to such depot. We think this is error. The location of a depot at a given point is a general public benefit, although, as in the case of any general benefit created by public improvements, one citizen may be more directly and largely benefited than another. It seems to us that such benefits are of the same character as those resulting from the location and operation of the railroad itself. Such benefits are, in the nature of things, very unequally distributed, yet they are generally public benefits, and hence not within the statute allowing deductions therefor. R. S. 541, sec. 1848. That statute provides only for the allowance of special benefits in some cases, and such is not the character of the benefit under consideration. It would seem that a benefit which may thus be allowed is one which enhances the value of the land affected by it, by improving its physical condition and adaptability for use, such as by reclaiming waste land, by draining or flowing a marsh, by aiding in the development of a water-power, by dispensing with the necessity of maintaining fences, or by opening a mine or quarry, and the like. We are unable to conceive of any other kind of benefits which are not general benefits as well, and hence outside the statute. . . . In the Washburn case the learned circuit judge instructed the jury, in substance, that if the present value of the lands taken was enhanced by reason of the adaptability thereof to some use to which they might be put in the future,— as, for example, if land used only for farming purposes was so situated that it might be platted into city lots, and if its present value was thereby increased,— such increased value was the proper basis for the assessment. We think this is a correct rule."

[1] See Woodfolk v. Nashville R. R. Co. 2 Swan (Tenn.), 422, holding the

The present rule is that benefits shall not be considered in estimating damages, and that the owner shall not be compelled to pay for the pretended benefits that the state, county or private corporation involuntarily showers upon him, when the owner cannot be paid off in "benefits and advantages" that are forced upon him against his assent. He may be compelled to have his rights encroached upon when they come in conflict with the public interests, but after the appropriation the public power is exhausted. The state cannot say accept the benefits we have done you in payment. The party taking the land owes a debt to the owner, and the state cannot coerce the creditor to receive as compensation for the damages done the remaining property the enhancement of its value. The increase of price does not improve its fertility or beauty, nor add to its conveniences. The increase of value adds to his taxes and is financially injurious. The facilities afforded to travel for trade apply to all roads in the neighborhood. The damages must be paid in money when it is ascertained for all taken, and cannot be liquidated by the increase in value to other lands the owner may have left. See Lewis on Em. Dom. sec. 468, and numerous cases cited. See Pittsburg, etc. R. R. Co. v. Robinson, 95 Pa. St. 426; Carson v. Coleman, 11 N. J. Eq. 106; Baldwin v. Newark, 38 N. J. L. 158; Setzler v. Penn. R. R. Co. 112 Pa. St. 56. Penn. R. R. Co. v. Cleary, 125 Pa. St. 451: "The true measure of the damages sustained by any given lot of land is found in the difference between its selling value before and after the entry complained of. Reading R. R. Co. v. Balthasar, 119 Pa. St. 483. It is proper to consider for what purpose it may be used to advantage, in order to determine for what price it will sell. It may be salable as a site for the erection of a hotel, a factory, a dwelling or a wharf, but it is not proper to lay before the jury proof of what the hotel or other structure would cost, together with the proof of the value of the lot with such structure upon it and treat the difference between these sums as the value of the lot. Such a method would be speculative and fanciful. Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted, but it is the tract, and not the lots into which it might be divided, that is to be valued. . . . The jury are to value the tract of land, and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. A speculator or investor, in deciding what price he could afford to pay, would consider the chances and probabilities of the situation as then actually existing. A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in. This is a rule that is well settled, and the court should have drawn the attention of the jury to it so as to have left no room for uncertainty on their part. They should have been told that they had nothing to do with the subdivision of this tract, the price of the lots

land is really taken for the private advantage of the projectors of the improvement, although a public one, for he has not contracted to purchase such benefits, special or otherwise.[1]

§ 184. Benefit or damages to different tracts.— Where part of a farm, town lot or subdivision of land is taken, the damages will cover what is left of that tract, even though it contains several subdivisions by government survey, provided the land is contiguous and has been used as a tract by the owner for the same purpose.[2] Damages may be recovered

or the probability of their sale, but that they were to ascertain the fair selling value of the land before and after the entry by the railroad company, in order to determine the actual damage done to its owner." See Lewis on Em. Dom. sec. 469, and numerous cases.

[1] See cases last above cited. Colvill v. St. P. & C. R. R. Co. 19 Minn. 283; Scott v. Same, 21 Minn. 322; A. N. R. R. Co. v. Lansing, 16 Barb. 68; Bigelow v. West Wisconsin R. R. Co. 27 Wis. 478; Crater v. Fritts, 44 N. J. L. 374; Oregon Cent. R. R. Co. v. Wait, 3 Ore. 91. And see Willamet Falls Canal & Lock Co. v. Kelly, 3 Ore. 99; Ventura Co. v. Thompson, 51 Cal. 577; Susanna Root's Case, 77 Pa. St. 276; C. & M. C. R. R. Co. v. Ritter, 1 Tex. App. Civ. Cas. 107; Bowen v. A. R. R. Co. 17 S. C. 574; Bevier v. Dillingham, 18 Wis. 529.

[2] Ham v. W. I. & N. R. R. Co. 61 Iowa, 718: "The railroad was constructed through plaintiff's farm along a road which followed a government subdivision, plaintiff's house and other buildings being on the south side of the road, and much, if not the greater part, of the farm lying upon the north side. In determining the damages sustained by reason of the construction of the railroad, the injury to the whole farm was considered. Defendant claims that the injury should have been confined to the government subdivision upon which the road is located. The separate tracts of land as fixed by the government survey were used together as one farm, not separately and as distinct farms. The improvements and some cultivated land are on the south side of the road, the greater quantity of plow and pasture land is on the north, thus constituting the whole one farm, made up of all the separate government subdivisions. In determining plaintiff's damage the court properly held that the injury to the whole farm should be considered. Hartshorn v. B. C. R. & N. R. R. Co. 52 Iowa, 613; Renwick v. D. & N. W. R. R. Co. 49 Iowa, 664." This is true although the land lies in different counties and is divided by a highway. A. & N. R. R. Co. v. Gough, 29 Kan. 94. Where the owner has divided his land into two farms, and rents one and occupies the other, they should be regarded as separate tracts, although adjoining. See M. V. R. R. Co. v. Doran, 15 Minn. 230; St. P. & S. C. R. R. Co. v. Murphy, 19 Minn. 500; Whitney v. Boston, 98 Mass. 312; Wilcox v. St. P. & N. P. R. R. Co. 35 Minn. 439; Welch v. M. & St. P. R. R. Co. 27 Wis. 108. See, also, where parts of three quarter-sections were taken and water privilege affected, Bd. of Com. v. Labore, 37 Kan. 480; Fleming v. Chicago R. R. Co. 34 Iowa, 353.

for the value of the land taken for any use for which it can be sold on the market, for the market value is the true criterion; and if the locality of the land is such as to render it desirable for any purpose for which it can be sold for money, such price as it will command is its market price, irrespective of its intrinsic worth.[1] While remote and possible elements of dam-

[1] Pittsburg, Va. etc. R. R. Co. v. Vance, 115 Pa. St. 331: "The market value of land is not necessarily, as would sometimes seem to be supposed, the price which it would command in a forced sale by public auction; it is estimated upon a fair consideration of the location of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood at the time. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve may be regarded as the market value. R. R. Co. v. Patterson, 11 Outerbridge, 464. . . . If the peril and inconvenience to customers from this cause was such that they were thereby induced to carry their grain to be ground to other mills, and the plaintiff's land was thereby depreciated, the taking of the plaintiff's property and the construction of the railroad thereon were the direct and the immediate cause of this injury. The testimony, therefore, in regard to the loss of custom, and the (as we said in W. P. R. R. Co. v. Hill, 56 Penn. 460) reason for it, 'were properly received, and submitted to the jury as grounds of compensation to be made to the plaintiff for the deterioration of the property.' . . . The law is, we think, very correctly laid down in the very recent case of The P. B. & B. R. R. Co. v. McCloskey, 16 W. N. C. 561 (110 Pa. St. 436), where the general principle is thus stated: 'The inconvenience arising from division of the property, or from increased difficulty of access, the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields or farm buildings, not resulting from negligence, and, generally, all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration, but they are to be considered in comparison with the advantages only as they affect the value of the land.'" Same rule applied in Lawrence v. Boston, 119 Mass. 125; Doud v. M. C. & F. D. R. R. Co. 76 Iowa, 440. See note 1, § 185. H. & N. R. R. Co. v. Dickerson, 17 B. Mon. 173; 66 Am. Dec. 148: It was provided by statute that "where any assessment of damages for the right of way has been or shall hereafter be made, it shall be lawful for either of the parties, the person whose land has been condemned, or the said company, to prosecute an appeal to the court of appeals, at any time within three years from the time such assessment was made, for the correction of any errors that may have been made to the prejudice of the party appealing." The court say: "The appellee has a vested right in his land. This right he cannot be divested of under the constitution until just compensation has been made him for it. The judgment which he obtained did not divest him of his right to his property, nor did

age are not to be considered, the damages are not confined to the value of the land for its then use, but include its value for any use. Land may be so situated as to be valuable for

it enlarge his rights nor invest him with any additional ones. He could not have a vested right to the land and also to the amount of the judgment. A vested right to the latter, in the proper sense of the term, could not accrue until the money was collected. He has a constitutional right to have just compensation made him before he shall be deprived of his property, but the legislature has the power to prescribe the mode in which such compensation shall be ascertained and determined in a fair and just manner. The amendatory act under consideration did not violate nor impair any vested right, but only furnished to either party the same opportunity which other litigants had to correct any errors that may have been committed by the court below. . . . The constitution (article 13, section 14) declares that no man's property shall be taken or applied to public use without just compensation being previously made to him. And according to the construction given to this provision in the cases of Sutton v. City of Louisville, 5 Dana, 28, and Rice v. Danville T. R. Co. 7 id. 81, the compensation secured to the owner is the actual value in money of the property taken from him, which cannot be diminished by any speculative advantage he may derive from its appropriation to the public use. . . . The road which the appellants are constructing will pass through the farm of the appellee in such a way as to separate his dwelling-house and a portion of his improvements from the residue of his tract, and by running nearly parallel with another public road will leave between the two roads a long narrow strip of land upon which his dwelling-house and part of his improvements are situated, whilst the balance of his improvements and also of his tract of land will be on the opposite side of the railroad. . . . The constitution secures to the owner of the land just compensation for his property before he can be deprived of it. Its value to him, considering its relative position to his other land, and the other circumstances which may diminish or enhance that value, can alone afford him a just compensation for its loss. To third persons the same quantity of land of equal quality on one of the boundaries of the farm might be of as much value as if it were situated in the middle of the farm, but at the same time its value thus ascertained might be a very inadequate compensation to the owner if the land were taken out of the middle of his farm, so as to separate it into different parts, instead of being taken on one of its boundary lines. The real value of the land to the owner, as it is actually situated, and not merely its value regarding it as a separate and independent piece of land, he has a right to demand, and nothing less can secure him a just compensation for his property. In making such an estimate, however, the inquiry should not be, what price would induce him to sell the ten acres of land thus situated, because he might not be willing to sell it at any price; but the inquiry should rather be, what would be its value to him situated as it is, if he were not the owner of it, but owned the adjacent property on both sides of it, under the same circumstances precisely that now exist. Its actual value to him in

subdivision into lots, or for many purposes I need not mention; and such use may be shown and considered. The manner that the land is to be used by the company taking it is

that condition would be as much as he has a right to demand, and would afford him that just compensation for his property secured to him by the constitution. The thirty-eighth section of the act of the legislature passed in 1851 (vol. 2, Sess. Acts 1850–1, p. 297), under which the valuation in this case was made, provides that the 'commissioners, in making the valuation, shall take into consideration the loss or damage which shall accrue to the owner or owners in consequence of the land or right of way being taken or surrendered, and also the benefit or advantage that the owner or owners may receive from the construction or establishment of the railroad, or any branch of it, or its works, and shall particularly state the nature and value or amount of each; and the excess of the loss or damage over and above the benefit and advantage to the owner or owners shall form the measure of valuation of the said land or right of way.' But so far as the foregoing provision tends to defeat or render nugatory the clause in the constitution which secures to the owner a just compensation for any of his property that may be taken for public use, which compensation must be made in its actual value in money, and not in benefits and advantages which may be derived from the construction or establishment of the railroad, it is wholly inoperative and must be disregarded. If, however, the owner claims more than the value of the property taken, and seeks indemnity for consequential inconvenience or injury, then the advantages which result to him may be taken into consideration, and such advantages and disadvantages may be compared and set off, the one against the other, and if the advantages are equal to the disadvantages, then he will not be entitled to anything for such consequential inconvenience or injury. . . . The advantages which the owner may derive from the construction of the road are not in the least diminished by the fact that they will be enjoyed by others, nor does it furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from the establishment of the road. Other persons, it is true, may enjoy the same advantages without being subjected to the same inconvenience, but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes." Legislature may prescribe mode of ascertaining amount of compensation to be made, where private property is taken for a public use, if the constitution is silent on that point. Beekman v. Saratoga R. R. Co. 22 Am. Dec. 679, and note on eminent domain, 686 *et seq.*; Livingston v. Mayor, etc. of N. Y. id. 622, note 634; Ex parte Martin, 58 id. 321, and note 332, collecting prior cases. Amount of compensation which must be made for lands taken for a public use. See Bloodgood v. Mohawk & Hudson R. R. Co. 31 Am. Dec. 313, and extensive note thereto 372 *et seq.*; Moale v. Mayor of Baltimore, 61 id. 276, and note 282, collecting prior cases. Articles of state constitution guaranteeing to citizens right of acquiring, possessing and protecting property necessarily imply a prohi-

important, and cases arise where the construction of the works are so different from that stated and set forth at the time of

bition upon the legislature from taking private property for a public use without providing just compensation to be first made to the owner. Ex parte Martin, 58 Am. Dec. 321. See, also, Bailey v. Philadelphia R. R. Co. 44 id. 593; Boston & Gunby v. Cummins, 60 id. 717; Moale v. City of Baltimore, 61 id. 276, and note 283. Resulting benefits may be offset against value of property taken for public use in the exercise of the right of eminent domain. Symonds v. Cincinnati, 45 Am. Dec. 529, and extended note thereto, 532 *et seq.*, citing the principal case. And see also on the same subject Livingston v. Mayor of N. Y. 22 id. 622; Nichols v. City of Bridgeport, 60 id. 636, and note 648; Harrison v. Io. M. R. R. Co. 36 Iowa, 323. All facts as to the condition and surroundings of the property may be shown, its capabilities and its improvements. Moody v. Jacksonville R. R. Co. 20 Fla. 597; Thompson v. Grand Gulf R. R. Co. 3 How. (Miss.) 240; Pearson v. Johnson, 54 Miss. 259; Piscataqua Bridge Co. v. N. H. Bridge Co. 7 N. H. 35. Boom Co. v. Patterson, 98 U. S. 404: "The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi river above the falls of St. Anthony, in the county of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end on the island farthest down the river with the west bank, and this connection could be readily made by boom sticks and piers. The land on these islands owned by the defendant in error the company sought to condemn for its uses, and upon its application commissioners were appointed by the district court to appraise its value. They awarded to the owner the sum of $3,000. The company and the owner both appealed from this award. When the case was brought before the district court, the owner, Patterson, who was a citizen of the state of Illinois, applied for and obtained its removal to the circuit court of the United States, where it was tried. The jury found a general verdict assessing the value of the land at $9,358.33, but accompanied it with a special verdict assessing its value aside from any consideration of its value for boom purposes at $300, and in view of its adaptability for those purposes a further and additional value of $9,058.33. The company moved for a new trial, and the court granted the motion, unless the owner would elect to reduce the verdict to $5,500. . . . The only question on which there was any contention in the circuit court was as to the amount of compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated. But the company now

taking that the damages may be re-assessed. It is therefore competent to show how the land will be affected by the struct-

raise a further question as to the jurisdiction of the circuit court. Objections to the jurisdiction of the court below, when they go to the subject-matter of the controversy and not to the form merely of its presentation or to the character of the relief prayed for, may be taken at any time. . . . The position of the company on this head of jurisdiction is this: that the proceeding to take private property for public use is an exercise by the state of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition, it is an attribute of sovereignty. The clause found in the constitutions of the several states, providing for just compensation for property taken, is a mere limitation upon the exercise of the right. When the use is public the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties — the owner of the land on the one side and the company seeking the appropriation on the other — there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state. . . . Upon the question litigated in the court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated, there is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted: that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule, but as a general thing

ure, grade, cut or other anticipated change that will be made. The cases cited in the note will show the rule.[1]

§ 185. Damages for improper construction.— There is no presumption that a railroad, canal, highway or other public

we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The position of the three islands of the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river, as by utilizing them in the manner proposed they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands. . . . The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value, find support in the several cases cited by counsel. Thus, In the Matter of Furman Street, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the supreme court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him, but that the proper inquiry was, 'What is the value of the property for the most advantageous uses to which it may be applied?' In Goodin v. Cincinnati & Whitewater Canal Co. 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the supreme court of Ohio held that the rule of valuation was what it was worth, not for canal purposes or for any particular use, but generally for any and all uses for which it might be suitable. And in Young v. Harrison, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the supreme court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied having reference to existing and prospective wants of the community. Its value as a bridge site was therefore allowed in the estimate of compensation to be awarded to the owner." Minn. V. R. R. v. Doran, 15 Minn. 230. See Everett v. U. P. R. R. Co. 59 Iowa, 243. The fair market value of land in view of all the purposes to which it is adapted or for which it can be made available is the criterion to determine its worth. Moulton v. Newburyport Water Co. 137 Mass. 163.

[1] See W. St. L. & P. R. R. Co. v. McDougal, 118 Ill. 229; C. & N. W. R. R. Co. v. C. & E. R. R. Co. 112 Ill. 589; Carpenter v. Easton & Amboy R. R. Co. 26 N. J. Eq. 168, where the court say the plan of the road and mode of construction must be before the appraisers and enter into and modify the assessment of damages.

improvement will be improperly constructed or operated. The presumption is that the work and management will be conducted with skill and care; if it is not so conducted, then the corporation or proprietor is liable in an action for neglect to the person injured.[1] We cannot go into the measure of dam-

[1] See Jackson v. Portland, 63 Me. 55; Railroad Co. v. Larson, 40 Kan. 301; R. R. Co. v. Gardner, 45 Ohio St. 309; Shealy v. Chicago, etc. R. R. Co. 72 Wis. 471; Esch v. Chicago, etc. R. R. Co. 72 Wis. 229. Elements to be considered in assessing damages in condemnation proceedings. Kiernan v. Chicago R'y Co. 123 Ill. 188; Atchison R. R. Co. v. Schneider, 127 id. 144; Matter of Opening First Street, 66 Mich. 43. Compare Wier v. St. L. R. R. Co. 40 Kan. 130; Spencer v. Hartford R. R. Co. 10 R. I. 14; Miller v. K. & D. M. R. R. Co. 63 Iowa, 680. Doud v. M. C. & Ft. D. R. R. Co. 76 Iowa, 439: "We understand the well-established rule in proceedings of this character to be that the recovery of the property owner is not limited to the damages which he would sustain if the property were to be used only for the purposes to which it is devoted when such proceedings are had, but that the value of the property for any purpose for which it is available may be considered. Boom Co. v. Patterson, 98 U. S. 403; In re Furman St. 17 Wend. 669; Goodin v. Canal Co. 18 Ohio St. 169; Young v. Harrison, 17 Ga. 30; Stinson v. R. R. Co. 27 Minn. 284; 6 N. W. R. 784; Montana R. R. Co. v. Warren, 6 Mont. 275; S. C. 12 Pac. Rep. 641; Little Rock Junction R. R. Co. v. Woodruff, 49 Ark. 381; S. C. 5 S. W. Rep. 792; State v. Moore, 12 Cal. 71. If the property in question had value as coal land, it was proper to show that fact. . . . The proceedings were brought to ascertain the damage caused to plaintiff by the taking of a right of way one hundred feet wide for railway purposes. The damages which can be considered in such a proceeding are those which will result from a proper use of the land appropriated in the construction and operation of the railway. Miller v. Keokuk & D. M. R. R. Co. 63 Iowa, 685. Damages which result from an improper construction of the road cannot be considered in such proceeding. King v. Iowa Midland R. R. Co. 34 Iowa, 458. If a railway company, in constructing its road, goes upon land outside its right of way, and removes therefrom earth or other property belonging to another, it is a mere trespasser, and is liable as such. See Waltemeyer v. Wis., I. & N. R. R. Co. 71 Iowa, 626. . . . There would be no authority for assessing damages for an anticipated trespass before the construction of the road, and the damages contemplated by the law are the same whether assessed before or after the road is built, excepting that in the latter case interest may be allowed. Daniels v. Chicago, I. & N. R. R. Co. 41 Iowa, 52. The rule for estimating the damages adopted by this court is 'to ascertain the fair merchantable value of the premises over which the road passes, and the like value of the same premises in their condition after the right of way is taken, leaving out of view all the time all benefits which may result from the improvement.' Fleming v. Chicago, D. & M. R. R. Co. 34 Iowa, 357. Or, as stated in Henry v. D. & P. R. R. Co. 2 Iowa, 309, it 'is to determine the fair marketable value of the premises before the right is set apart, and then again after, and the

ages in detail; suffice it to say that every case stands on its own foundation, and any direct injury arising to the owner, or several owners if more than one, is recoverable in proportion to the injury received by each. As this question is not within the scope of a work on the subject to which this treatise is devoted, we only desire to show what is settled by the judgment of condemnation. We may say that the fact that the owner of land has signed a petition for the street, highway or other improvement does not estop him from claiming damages if his land is taken.[1]

difference will be the true measure of damages;' to which must be added the modification that benefits must be disregarded, required by the constitution of 1857."

[1] Barker v. Taunton, 119 Mass. 392. But an agreement to waive damages if the road is laid over the petitioner's land is an estoppel unless revoked before the location is made. Conwell v. S. & N. W. R. R. Co. 81 Ill. 232. A waiver of one item of damages cannot be construed into a waiver of another. Easton Borough v. Rinek, 116 Pa. St. 1; Mitchell v. Bridgewater, 10 Cush. 411. M. U. B. W. Co. v. Chicago, R. I. & P. R. R. Co. 79 Iowa, 617: "The issue is squarely presented whether the track last laid down was constructed in pursuance of a parol license of the then owners of the lots which are now owned by the plaintiff. If the then owners, either in writing or by parol, joined with the owners of the other lots abutting on the street in an agreement that the track might be laid down and operated, and in pursuance of that agreement the defendant laid down its track and has continued to operate it, the case surely presents all the elements of estoppel, not only as against the then owners of the lots, but as against their subsequent assignees or grantees. A subsequent grantee of the lots would be charged with notice of all of the rights of the defendant from the fact that it was in possession of that part of the street upon which the track was laid. We are now come to a consideration of the facts which we think are established either without conflict or by a fair preponderance of the evidence. In the year 1874 the lots in controversy were owned by Dyer H. Young and John E. Williams. They acquired the title from S. R. Ingham in the year 1866. Before the side track was laid in 1874, one Ankeny, who was part owner of an oil mill on the same side of the street and west of the lots belonging to Williams and Young, circulated a petition among the lot-owners, by which those who signed it consented to the laying down of the track. While it is true that neither Young nor Williams signed this petition, yet we think it is fairly shown by the evidence that Young was present when the track was staked out by the engineer, and that he assented to it as fully as the other property owners along the south side of the street. It was a matter of discussion among the property owners, and all of them appear to have been aware of the fact, that at that time abutting property owners were to be consulted, at least, before a street could be appropriated for the use of railroad tracks. We have said that

Where a verdict is found for the owner of the land, the statute being silent, and the corporation not in possession of the right of way, the judgment should not be rendered absolutely, but should fix the value of the land; and the railway company, or other party desiring the property, may dismiss the proceedings upon payment of costs and decline to take the property.[1] But if the corporation has entered into possession of the property, then the finding is binding, and a judgment should be entered absolutely against the defendant for the amount found due to the owner.[2]

Young and Williams were then the owners of the lots. . . . But it is claimed that no consent of Williams, who was an owner in common with Young, was shown by the testimony of any witness. It may be the law that the consent of one tenant in common that the land held in common may be appropriated for right of way for a railroad will not bind his co-tenant; that a conveyance by him for that purpose is good only for his own interest, or that the exercise of eminent domain, by condemnation proceedings, when but one of two owners is made a party, is not binding on the other. But that is not the question presented for our consideration. The owners of lots abutting on a street have no title to the street. When a railroad track is laid in the street the land abutting on the street is not appropriated to a public use. The right of such an owner is not within the constitutional provision requiring just compensation to be made to the owner of land appropriated for public use. Without the statute just above cited, the owner of abutting property is not entitled to damages, and, under the statute, his claim is one for damages only. We think that, under the facts of this case, taking into consideration the lapse of time and the notoriety of the occupation of the street, and the further fact that the track which was lawfully laid in 1870 is the one nearest to plaintiff's lots, the plaintiff has not shown that it is entitled to equitable relief on account of the appropriation of that part of the street in which the track was laid in 1874. That it was competent for the then owners to waive their right to damages by parol, and that such waiver cannot be revoked by their grantee, was held in Pratt v. Railroad Co. 72 Iowa, 249. It was a mere claim of damages to the lots, and, even if the consent of Williams was not expressly shown, we think that such a consent could be made by Young, and that it would bind Williams, especially in view of the circumstances to which we have called attention." See Turner v. Stanton, 42 Mich. 506; Haskell v. New Bedford, 108 Mass. 208.

[1] Hastings v. B. & M. R. R. Co. 38 Iowa, 316; Bloomington v. Miller, 84 Ill. 621; Evansville & C. R. R. Co. v. Miller, 30 Ind. 209; K. C. R. R. Co. v. Merrill, 25 Kan. 421; Elizabethtown R. R. Co. v. Thompson, 79 Ky. 52; State v. Hug, 44 Mo. 116; Oregon R. R. Co. v. Bridwell, 11 Ore. 282; C. & O. R. R. Co. v. Bradford, 6 W. Va. 220; State v. Mills, 29 Wis. 322.

[2] Cook v. South Park Com. 61 Ill. 115; Rockford R. R. Co. v. Coppinger, 66 Ill. 510; St. Louis R. R. Co. v. Teters, 68 Ill. 144; Peoria & R. I. R.

§ 186. Jurisdiction on appeal and the right of appeal.— In nearly all the states, where property is taken under the exercise of the right of eminent domain, the statutes provide for a tribunal which exercises the power to assess damages in the first instance; provision is also made for an appeal to a court where a common-law trial can be had on the question of damages.[1] It is not usual that the right of appeal is given to determine the question of the right to exercise the power of eminent domain; the power itself is not the subject of review when the right to exercise it exists. If the use to which the property is sought to be subjected be not a public use, then the power to exercise the right cannot be given by the legislature. The legislature may authorize an inferior tribunal which is not possessed of judicial power to assess the damages; and need not provide for an appeal. The action of the special tribunal is final, where no constitutional provisions interfere.[2] The rule, however, is arbitrary and unjust, and the

R. Co. v. Mitchell, 74 Ill. 394; Curtis v. St. Paul R. R. Co. 21 Minn. 497; Robbins v. St. Paul R. R. Co. 24 Minn. 191. But in Louisville R. R. Co. v. Ryan, 64 Miss. 899, it was held improper to render a personal judgment, though the railroad was in possession, on the ground that the company might prefer to abandon the location and remain liable for the trespass. Gear v. D. & S. C. R. Co. 20 Iowa, 523.

[1] Myers v. Simms, 4 Iowa, 500; McCune v. Swafford, 5 Iowa, 552. Courts usually will review the question of damage to correct errors of law. L. & U. M. R. R. Co. v. Smith, 8 Ind. 253; St. Louis R. R. Co. v. Lux, 63 Ill. 523.

[2] If there is no provision for an appeal the decision of the inferior tribunal is final and conclusive. Matter of P. P. & C. I. R. R. Co. 85 N. Y. 496: "But if we assume that, by this appeal, the report and award of the commissioners are brought before us, yet we are of opinion that there is nothing for us to review. The commissioners are to determine the amount of compensation to be made to the owners of land taken, and in making such a determination they must decide all the questions involved. They may err in their judgment and yet the statute makes a second report 'final and conclusive.' That cannot be reviewed by appeal or *certiorari*. . . . They may have erred in their judgment, but the law gives no other tribunal the right or power to correct the error, if one was committed. In the Matter of the New York Central R. R. Co. v. Marvin, 11 N. Y. 276, the report of the commissioners appointed under the act of 1850 was confirmed by the special term, and, upon appeal, by the general term of the supreme court. The land-owners then appealed to this court, and although the report then in question was a first report, it was held that there could be no appeal to this court, and the appeal was upon motion dismissed. Parker, J., said: I think it was the intention of the

right of appeal should be given from the assessment of damages, where, under the instruction of the court, a jury may pass on the question. As a rule, irregularities as well as jurisdictional questions may be reviewed by *certiorari* in the proper court; errors may thus be corrected and the rights of the parties preserved when an appeal is not given.[1] If an ap-

legislature to prescribe in the railroad act an entire system for ascertaining the value of the lands taken. It contains no express provision authorizing an appeal. It gives to the supreme court the power of granting a rehearing but once, and by declaring the second report 'final and conclusive,' it not only precludes any further action on the part of the supreme court, but cuts off also any appeal from such second report to this court.' . . . In the Matter of D. & H. Co. 69 N. Y. 209, in a case where a first report of commissioners was under consideration, Allen, J., said: 'The original act authorizing the formation of railroad corporations (chapter 140 of the Laws of 1850) creates a system complete in itself for the acquisition of land for the purposes of railroads and the appraisal of damages to the owner of lands taken, and by section 18 the determination and judgment of the supreme court, upon an appeal from the appraisers, is made final and conclusive, as that statute has been interpreted, and no appeal lies to this court.' . . . It is further claimed that the construction which holds the second report of the commissioners final and conclusive renders the act of 1850 in that respect unconstitutional, because it deprives the supreme court of its constitutional jurisdiction, and denies to the landowner due process of law. A decisive answer to this is that the commissioners are the tribunal provided by the constitution to ascertain the compensation to be made to landowners in such cases. Constitution, art. 1, sec. 7. The compensation is to be ascertained by a jury or by commissioners appointed by a court of record. When commissioners have been appointed, no other tribunal can ascertain the amount of compensation, or increase or diminish the amount which may be awarded by them. The whole question is submitted to them. Without any violation of the constitution, the legislature could have made the first report final and conclusive, and that would have been the very 'process of law' provided by the constitution. The commissioners may err like any other tribunal of final resort, and for such error there is no remedy." Perkins v. State, 118 N. Y. 660; Appeal of Houghton, 42 Cal. 35; N. S. R. R. Co. v. Ely, 95 N. C. 77.

[1] *Certiorari* is a writ issued by a superior to an inferior court or tribunal having or exercising *quasi*-judicial powers and functions. See State v. Gill, 84 Mo. 248; Phifer v. C. C. R. R. Co. 72 N. C. 433; Myers v. Simms, 4 Iowa, 500; Edgar v. Greer, 14 Iowa, 211; Stubenrauch v. Neyenesch, 54 Iowa, 567. 2 Dillon on Munic. Corp. sec. 926: "The unquestionable weight of authority in this country is, if an appeal be not given or some specific mode of review provided, that the superior common-law courts will, on *certiorari*, examine the proceedings of municipal corporations, even although there be no statute giving this remedy; and if it

peal is provided for, that writ will not usually be granted; but if there was no jurisdiction in the inferior tribunal, the writ will lie, and is the proper remedy, even though an appeal is also provided for.[1]

§ 187. When and how the application should be made.— The application for the writ of *certiorari* should be made by petition to a superior court having common-law jurisdiction, setting forth the nature of the proceedings sought to be reviewed and the error or irregularity complained of fully and specifically. It should be duly verified, showing that petitioner has an interest in the subject-matter of the controversy; notice should be given the adverse party.[2] The opposite party may show a waiver by the applicant of the irregularity complained of, or other inequitable circumstances, to defeat the application.[3] The applicant is not entitled to the writ as a

be found that they have exceeded their chartered powers or have not pursued those powers, or have not conformed to the requirements of the charter or law under which they have undertaken to act, such proceedings will be reversed or annulled. An aggrieved party is in such case entitled to a *certiorari ex debito justitiæ*. Thus, if no appeal or other mode of review be given, and if there be no statute to the contrary, the legality of convictions in municipal courts will be revised on *certiorari*. So under the same circumstances and in the same way the proceedings of municipal corporations in opening streets will be examined and reviewed." Tarlton, In re, 2 Ala. 85; Dwight v. Springfield, 4 Gray, 107; Carron v. Martin, 26 N. J. L. 594; Dorchester v. Wentworth, 31 N. H. 451; Parks v. Boston, 8 Pick. 218, 225; Ewing v. St. Louis, 5 Wall. 413; St. Charles v. Rogers, 49 Mo. 530; Bacon's Abr. Certiorari, B.; People, etc. v. New York, 2 Hill, 9, 11; People v. Park Com'rs, 97 N. Y. 37. Street and assessment cases: People v. Covert, 1 Hill, 674; Re Wilson, 32 Minn. 145; State v. St. Paul, 34 Minn. 250; Att'y-Gen'l v. Northampton, 143 Mass. 589, holding that this writ does not lie to quash proceedings of a city council in appointing a police officer in violation of a statute for the improvement of the civil service.

[1] Cedar Rapids R. R. Co. v. Whelan, 64 Iowa, 694; B. & M. R. R. Co. v. Folsom, 46 N. H. 64; Tucker v. Parker, 50 Mich. 5. To test jurisdictional questions. Dunlap v. Toledo R. R. Co. 46 Mich. 190; St. Charles v. Stewart, 49 Mo. 132; Com. v. Harper, 38 Ill. 103; Baldwin v. Buffalo, 35 N. Y. 375; Shields v. Justices, etc. 2 Coldw. 60.

[2] Board of Supervisors v. Magoon, 109 Ill. 142; Chambers v. Lewis, 9 Iowa, 583; Richman v. Board of Supervisors, 70 Iowa, 627; Milan v. Sproull, 36 Geo. 393; Berryman v. Little, 49 N. J. L. 182; Vanderstolph v. Highway Com. 50 Mich. 330.

[3] Spofford v. B. & B. R. Co. 66 Me. 44: "The petition in this case does not present a case within the provisions of the statute. To give the commissioners jurisdiction the petition should contain a description of the

matter of right, but the issuing of it is discretionary with the court, depending on the nature of the irregularities and whether injury has been caused thereby.[1] The writ should be directed to the inferior tribunal and the proceedings sought to be removed must be described. It must command such tribunal to certify such portion of the record as is specified to the superior court; and if the portion to be certified relates to some matter not appearing of record, such as rulings of the inferior tribunal in the admission of evidence, such matter must be described and regularly certified. The hearing of the court must be based on the return and the record, and those alone.[2] The only questions that will be considered relate to

estate which the corporation claims to take, naming the persons interested in it, with averments that the corporation claims to take it for some one or more of the purposes specified in the statute and that the parties do not agree as to the necessity and extent of the estate described to be taken for the purpose or purposes named. The petition does not contain these averments, neither in form nor substance. It starts out with the allegation 'that said corporation and Frederic Spofford, of Bucksport, in the county of Hancock, do not agree as to the necessity and extent of the real estate to be taken for side tracks and buildings for said road.' This clause contains the only allegation of a claim by the corporation to take real estate, of the purpose for which it claims to take it, and of disagreement as to the necessity and extent of the real estate to be taken. It does not appear what estate the corporation claims to take, nor does it appear that it claims to take any estate for one or more of the purposes named in the statute, and that the parties disagree as to the necessity and extent of the estate to be taken for such purpose. The allegation is that they 'do not agree as to the necessity and extent of the real estate to be taken for side tracks and buildings for said road.' "

[1] Boston & Maine R. R. Co. v. Folsom, 46 N. H. 64; Granville v. Co. Com. 97 Mass. 193; Board of Supervisors v. Magoon, 109 Ill. 142. Denial of writ because of delay. See Wilder v. Hubbell, 43 Mich. 487; Hyslop v. Finch, 99 Ill. 171; State v. Woodruff, 36 N. J. L. 204; Rinehart v. Cowell, 44 N. J. L. 360. See Wright v. Rowley, 44 Mich. 557, as to actual notice. Pagels v. Oaks, 64 Iowa, 198.

[2] State v. Kansas City, 89 Mo. 34; Benjamin v. Dist. Tp. 50 Iowa, 648. Church v. Northern Cent. R. R. Co. 45 Pa. St. 341 (Thompson, J.): "On the 29th of August, 1859, the plaintiff in error petitioned the court of common pleas of Cumberland county for the appointment of viewers under the provisions of the act of 19th February, 1849, to assess the damages alleged to have been done her by the company in the location and construction of their road, in her individual right as 'owner,' as she claims in her petition, of the one-third part of the land described, and also to the estate and property which, in her life-time, belonged to her daughter Mary V. Church, deceased, and for which she was administratrix, described as being

the jurisdiction of the inferior tribunal and the regularity of its proceedings. Its decision on questions of fact or matters of discretion will not be reviewed.[1] Where the tribunal lacks

one-fifth of the lands. On the same day the court granted the prayer of the petitioner, appointed viewers and issued an order for their meeting on the premises on a day named therein. In pursuance of the order the viewers met, and, after one or more adjournments, assessed damages in favor of the petitioner in the sum of $1,000. . . . The substance of these exceptions was that the petitioner had no such title to the premises in her own right, as set forth in her petition, that she was not the 'owner' of one-third of the lands described, and that her daughter was not in her life-time the owner of the one-fifth of the premises described, and that, therefore, these titles were erroneously set forth in the application for the view to assess damages done thereon. After argument, and on the 20th August, 1861, the court being of opinion with the exceptants, set aside the whole proceeding at the cost of the petitioner, whereupon she sued out this *certiorari*. It is contended by the counsel for the plaintiff in error that the action of the court below was erroneous, and that the only remedy for errors not appearing on the face of the proceedings was by appeal under the act of 27th April, 1855, which provides for an appeal in proceedings thereafter instituted under the act of 19th February, 1849, and that the quantum of title in the petitioner could only appear by evidence *dehors* the record. It is difficult to see how this can be successfully gainsaid. The act of assembly, and the practice under it, require only that the petitioner set forth that he or she is the owner of the premises alleged to be injured, as was done here. We think that if the party against whom the application was made does not, at the time of the application for the appointment of viewers, object to the quantum of interest or title set forth by the petitioners, he is concluded as to that matter, unless there is a special right of inquiry into it given by statute, or he takes an appeal, when, the trial being according to the forms of the common law, the whole case will be passed upon *de novo*, and can be fully brought up for review if deemed expedient. . . . Here there is no presumption of law sufficient in itself to sustain the court in setting aside these proceedings, and no exhibition of evidence of which we can legally take notice authorizing it. The proceedings, including the report, being regular upon their face, and there being nothing legally impeaching them, it was error to set them aside." Duff's Private Road, 66 Pa. St. 459.

[1] Tiedt v. Carstensen, 61 Iowa, 335: "This ruling presents the only question in the case, namely: Is it competent for the court, in a proceeding by *certiorari*, to review the decision of the supervisors upon the question whether the public interest demands the road, and whether it is practicable and expedient to establish it? Code, section 3216, provides that 'the writ of *certiorari* may be granted whenever specially authorized by law, and especially in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when in the judgment of

jurisdiction by reason of an insufficient petition or want of notice to parties interested, then its proceedings will be quashed by the reviewing court.[1] The rule in regard to notice does not apply if the party had actual notice and was not prejudiced on account of any informality.[2] If the commissioners failed to

the superior court there is no other plain, speedy and adequate remedy.' The proceeding by *certiorari* is intended as a remedy whereby the superior court may inquire into the jurisdiction of the inferior tribunal or officer, and determine whether the tribunal or officer 'is acting illegally.' In this case there is no question of jurisdiction. We are, therefore, only to inquire, when is a tribunal 'acting illegally' in the contemplation of the statute? When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is in violation of law, and the court or officer omitting them would, therefore, act illegally. In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally. But if a discretion is conferred upon the inferior tribunal, its exercise cannot be illegal. If it be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject-matter and the parties are within its jurisdiction, for the law intrusts the decision to the discretion of the tribunal. From this brief statement it will be plainly seen that the statute does not contemplate that decisions of inferior tribunals upon questions of fact may be reviewed by the writ of *certiorari*. The distinction between erroneous proceedings which are termed 'illegalities,' and erroneous decisions of fact, is obvious. See Smith v. Bd. of Supervisors, 30 Iowa, 531; McCollister v. Shuey et al. 24 Iowa, 362; Jordon v. Hayne et al. 36 Iowa, 9." State v. Vandervere, 25 N. J. L. 233, 669.

[1] Richman v. Board of Supervisors, 70 Iowa, 631: "The supervisors constitute a board,—a court of special and limited jurisdiction. In the absence of a showing by the record of the board, or in some other manner authorized by law, no presumption will be exercised of the existence of the jurisdictional facts necessary to show that the supervisors acquired authority to act. We cannot presume the existence of facts, upon which their jurisdiction wholly depends. See State v. Weimer, 64 Iowa, 243; State v. Berry, 12 id. 58; Cooper v. Sunderland, 3 id. 114; Morrow v. Weed, 4 id. 77. . . . It is claimed that the record of the proceedings of the board of supervisors shows an adjudication that compliance was had with the law as to the number of petitioners. The petition is based upon a record in which the following language is found: 'And it appearing to the board that the law has been complied with in relation to the appointment, notices, etc.' This language cannot be understood as applicable to the petition. . . . We conclude that the abstract before us shows that defendant acted without jurisdiction and that the assessments and other acts done by them are void." Richman v. Supervisors, 77 Iowa, 513. See Frost v. Leatherman, 55 Mich. 33; Dunlap v. Toledo & G. R. R. Co. 46 Mich. 190.

[2] Everett v. C. R. R. R. Co. 28 Iowa, 417; Dunning v. The Drain Com. 44 Mich. 518; Ex parte Hinckley, 8 Me.

conform to the statute in a material matter, were for any cause disqualified to act, or adopted an erroneous principle in the assessment of damages, the writ will be sustained and the proceedings quashed.[1]

§ 188. Assessment and taxation.—The legislatures of many of the states have passed laws permitting, authorizing and providing that counties, townships, cities and local districts may levy taxes or assessments for the aid of railways and other public improvements, for which the exercise of the right of eminent domain has been permitted; and while such statutory provisions, where the taxes or assessments are in aid of the corporation, do not strictly come under the law authorizing private property to be taken for public use, the principle on which the validity of such laws rests arises out of and is closely connected with the right to take property for public use, and has no direct connection with general taxation.[2] In

146, where the commissioners were incompetent to act or failed to conform to the statute; Milton v. Wacker, 40 Mich. 229, where they adopted an erroneous principle in assessing damages. State v. Lord, 26 N. J. L. 141: "And the return states that due proof was made of the publication and setting up of notices according to law, but says nothing of the service of notice as required by the original act. This is fatal to the return. In proceedings to alter, change or abolish a ditch, drain or water-course, the same notice is required as in case of proceedings to lay out and open such ditches, etc. Nix. Dig. 482, pl. 64. The freeholders and surveyors, in those cases, exercise a special statutory jurisdiction affecting property rights, and their return must show that everything was done that is required by the statute under which they act and from which their power is derived. State v. Van Geison, 3 Green, 340; State v. Lewis, 2 Zab. 564. Another error assigned is that damages were assessed to Joshua F. Van Pelt, who was an applicant for the alteration. The fifth section of the act authorizes damages to be assessed only to land-owners 'not benefited by or requesting such ditch or drain.' Nix. Dig. 479, pl. 49. The assessment of $20 damages to Van Pelt was therefore unwarranted by law. Where damages assessed are clearly illegal and unauthorized this court will relieve on *certiorari*. Where the only objection is that they are unjust and inequitable, the remedy in the first instance is by appeal to the court of common pleas. Nix. Dig. 480, pl. 54; State v. Quaife, 3 Zab. 89."

[1] Lewis on Eminent Domain, § 549, and cases cited.

[2] Hammett v. Philadelphia, 65 Pa. St. 150: "It may be considered as a point fully settled and at rest in this state, that the legislature have the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited. It is a species of taxation, not the taking of private property by virtue of eminent domain. It was decided in McMasters v. Commonwealth, 3

addition to these provisions the state has exercised the right

Watts, 292, that in the opening of streets in a town or city the damage occasioned to some of the lots might be apportioned and assessed upon others in the same neighborhood improved in value thereby. It is there assumed, as a well-settled principle, employing the words of Chancellor Walworth in Livingston v. New York, 8 Wend. 85, that when any particular county, district or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement and in proportion to the supposed benefit received by each. The conclusion seemed logically to follow; for, if a county, district or town can be assessed for a public improvement on the ground that they are particularly benefited, there can be no constitutional reason to exempt an individual from assessment on the same principle. It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right. This doctrine is again asserted in Fenelon's Petition, 7 Barr, 173; and in the subsequent case of the Extension of Hancock Street, 6 Harris, 26, the constitutionality of such an exercise of the taxing power was declared to be no longer an open question. On the same principle the validity of municipal claims assessed on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts and laying water-pipes, in proportion to their respective fronts, has been repeatedly recognized, and the liens for such assessments enforced. Pennock v. Hoover, 5 Rawle, 291; The Northern Liberties v. St. John's Church, 1 Harris, 104; Philadelphia v. Wistar, 11 Casey, 427; Commonwealth v. Woods, 8 Wright, 113; Magee v. Commonwealth, 10 id. 858; Wray v. The Mayor of Pittsburg, id. 365. These cases all fall strictly within the rule as originally enunciated — local taxation for local purposes — or, as it has been elsewhere expressed, taxation on the benefits conferred, and not beyond the extent of those benefits. There is, indeed, no clause in the constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister states. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of provisions in the Bill of Rights, everything in which is excepted 'out of the general powers of government, and shall forever remain inviolate.' There is no case to be found in this state, nor, as I believe after a very thorough research, in any other — with limitations in the constitution or without them — in which it has been held that the legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. I shall have a word to say presently of two or three of our cases which are supposed to countenance such an idea. It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation. That can be only the consequence of attainder for crime,

to assess property bordering on streets, alleys, parks and other

and not even to its full extent, for there can be no forfeiture of estate to the commonwealth except during the life of the offender. It is well remarked by Chief Justice Robertson, of Kentucky, under a constitution without restraint on the legislative power of taxation: 'An exact equalization of the burden of taxation is unattainable and utopian. But still there are well-defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. . . The legislature, in the plenitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue of the whole commonwealth. Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would undoubtedly be the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, and without contribution of the value in money.' Lexington v. McQuillan's Heirs, 9 Dana, 513. 'A legislative act,' says Chief Justice Beasley, of New Jersey, 'authorizing the building of a public bridge, and directing the expenses to be assessed on A., B. and C., such persons not being in any way pecuniarily benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the person designated to a public use.' Tide-water Co. v. Coster, 3 C. E. Green, 518. 'The whole of the public burden,' says Chief Justice Black, 'cannot be thrown on a single individual under pretense of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the assembly by the general grant of legislative power. A prohibition was not necessary. An act of assembly commanding or authorizing them to be done would not be a law, but an attempt to pronounce judicial sentence, order or decree.' Sharpless v. Mayor of Philadelphia, 9 Harris, 168. It is said that the line of distinction between the right of taxation and the right of eminent domain is clear and well defined. Taxation exacts money or services from individuals as and for their respective shares of the contribution to any public burden. . . . Assessments on property peculiarly benefited by local improvements, and in consideration of such benefit, are constitutional — thus far have the judicial decisions in this and other states gone, and no further. A few only of the leading cases need be cited. In the Matter of Canal Street, 11 Wend. 154; Hill v. Higdon, 5 Ohio St. 243; Striker v. Kelly, 7 Hill, 9, 23; S. C. 2 Denio, 323; Goddard, Petitioner, 16 Pick. 504; Lowell v. Hadley, 8 Metcalf, 180; Garrett v. St. Louis, 25 Mo. 505; Anderson v. Kerns D. Co. 14 Ind. 199; Sanborn v. Rice County, 9 Minn. 273; Weeks v. City of Milwaukee, 10 Wis. 242; Creighton v. Mancon, 27 Cal. 613; Coster v. Tide-water Co. 3 C. E. Green, 54, 518. Undoubtedly the power of taxation is not to be rigidly scanned. Every presumption is to be made in its favor. If the case is within the principle, the proportion of contribution and other details are within the discretion of the taxing power. We may say with Judge Peck, of Ohio: 'It is quite true that the right to impose such special

places where improvements have been made, assessing the taxes are based upon a presumed equivalent, but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid.' . . . This case, indeed, is still clearer than that which I have put of a simple repairing. Broad street, in front of the lot of the plaintiff in error, was paved only a few years ago in the ordinary way in which all the other streets of the city have been paved — with cobble-stones,— and whatever advantage there was in his owning property on so wide and handsome a street was paid for by him in the increased cost assessed upon him for the paving. Without any pretense that it has been worn out and required to be replaced by another, it was torn up and a new and very expensive wooden pavement substituted. The plaintiff in error did not remain silent. He protested and remonstrated, and filed a bill in equity to restrain the work before it began. The city and their contractors can plead no equity against him. It is said that it was all for his interest. But whether he was mistaken or not as to his own interest, he was the judge of that, not this court. The case is not to be decided upon any particular results in this instance, but on general principles which can work with safety and advantage to the public in all other cases. Mr. Hammett may have been specially benefited, though we have no evidence of that on this record, and we have no right to consider evidence derived from any other source, but the next experiment may be unsuccessful and ruinous. It was well said by the court in People ex rel. Post v. Brooklyn, 6 Barbour, 209: 'If it be true that certain individuals are so greatly benefited, they will be quite as apt to discover where their interests lie as the common council, and if their lands are to be so much enhanced in value, they will by their contributions enable the authorities to perform the work at a very trifling expense to the city at large.' The object of this improvement is not to bring or keep Broad street as all the other streets within the built-up portions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive — a pleasure-ground — along which elegant equipages may disport of an afternoon. . . . We must say at some time to this tide of special taxation, thus far shalt thou go and no further. To our own decisions, as far as they have gone, we mean to adhere; but we are now asked to take a step much in advance of them. This we would not be justified by the principles of the constitution in doing. Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit." Turner v. Althaus, 6 Neb. 70: "It is said that taxation differs from the power of eminent domain in this: that it has no thought of compensation by way of return for that which it takes and applies to the public good, further than all derive benefit from the purposes to which it is applied. In other words, that 'the support of government, and other objects of public utility promoted by taxation, are supposed to return to the individual the same which has

cost of the improvement to the property supposed to be ben-

been taken from him as his share of the public burden.' Washington Ave. 69 Pa. St. 363; Wynehamer v. People, 13 N. Y. 404; People v. Brooklyn, 4 Comst. 419. A tax is defined as 'a charge, apportioned either among the whole people of the state, or those residing within certain districts, municipalities or sections.' Oliver v. Washington Mills, 11 Allen, 274. And as the responsibility of passing laws devolves exclusively on the legislature, whether the taxing power be exercised by it wisely or unwisely, justly or unjustly, or in some instances it may be abused, yet the 'interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise taxation.' . . . It is, however, a fundamental principle of law that a citizen cannot be deprived of his private property except by the due and orderly administration of the law, through its appropriate tribunals, and not by force of an act of the legislature. Hence, the legislative department cannot, by the exercise of legislative power, in any form of legislation, take the private property of one citizen and give it to another or to a corporation. Such an act would be judicial, depriving a citizen of his property without notice or due process of law, and would be repugnant to the constitution and contrary to the fundamental principles of all good government. Therefore, when the sole object of the legislative act is to take the property of one man and give it to another, the legislature transcends its legitimate power and assumes the determination of grave questions, over which it has no constitutional authority. In such case the strict divisions of the powers of the government should be enforced and the legislature be restrained from such invasion of private rights. Good v. Zercher, 12 Ohio, 367; Norman v. Heist, 5 W. & S. 171; Denny v. Mattoon, 2 Allen, 361; Greenough v. Greenough, 11 Pa. St. 494; Shawnee Co. v. Carter, 2 Kan. 131; Holden v. James, 11 Mass. 396; 2 Kent, Com. 13." Washington Ave. 69 Pa. St. 357: "This case presents a new question upon the power of taxation — the authority of the legislature to compel the owners of farm lands, lying within one mile on each side of a public highway, to pay for grading, macadamizing and improving it, by an assessment upon their lands by the acre. It is not a case of municipal taxation by a county, township, city or borough, for local improvements. The eminent counsel of McMasters, the late Judge Forward, seems to have considered the assessment of his property as an exercise of the power of eminent domain, and denied its validity upon the ground that the act proposed to take his property, or at least his money, and to compensate him in benefits. This, he contended, the legislature could not do, but must compensate him in money, citing Vanhorne v. Dorrance, 2 Dallas, 315, on this point. . . . To apply it to the country and to farm-lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at the very first blush every one would pronounce it to be palpably unreasonable and unjust. Judged of by this rule for deciding in a question of constitutional power, the law in this case cannot stand. . . . I admit that the power to tax is unbounded by

efited thereby.[1] Again, districts of land that are wet, unfit for cultivation, unsightly or unwholesome, are sometimes directed to be drained, filled, improved and cultivated, and pro-

any express limit in the constitution; that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purposes to which it is applied. But nevertheless taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by any palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment, and falls within the clearly-implied restriction in the Bill of Rights." Griffin v. Dogan, 48 Miss. 11; White v. The People, 94 Ill. 604. See, however, Extension of Hancock Street, 18 Pa. St. 26. In Louisiana the court first held special assessments to be an exercise of the taxing power in Municipality No. 2 v. White, 9 La. Ann. 446, and afterwards in the New Orleans Draining Co. 11 La. Ann. 338, 1856, and Surgi v. Snetchman, id. 387, held them to be an exercise of the power of eminent domain, but finally left the question in uncertainty in Wallace v. Shelton, 14 id. 498, and City of New Orleans, etc. 20 id. 497; and see, further, New Orleans v. Elliott, 10 La. Ann. 59; Yeatman v. Crandall, 11 id. 220. In New York the court of errors, in 1844–5, held assessments to be an exercise of the taxing power. Striker v. Kelly, 7 Hill, 9; S. C. 2 Denio, 323. Afterwards there were three decisions to the contrary in the supreme court. Jordan v. Hyatt, 3 Barb. 275; People ex rel. v. Mayor of Brooklyn, 6 id. 209; People ex rel. v. Mayor of Brooklyn, 9 id. 535. But the doctrine was finally settled in favor of the text in the case of People v. Mayor of Brooklyn, 4 N. Y. 419, where the court discuss at length the distinguishing characteristics of a tax and of an exercise of the eminent domain power. To same effect, Astor v. Mayor of New York, 5 Jones & S. 539; Moran v. City of Troy, 9 Hun, 540.

[1] The question whether taxes and assessments are synonymous arose in the case of State v. Mayor of Newark, 36 N. J. L. 478. The plaintiff, a charitable institution, was incorporated by legislative enactment, and its charter provided that its property should not be subjected to taxation or assessment. It acquired by benevolent contributions considerable real property adjoining the city. Two assessments were made, one for opening an avenue and one for curbing another avenue. The plaintiff's real estate was assessed, and the court, in holding the assessments void, said: "The judgment of that tribunal affirming the liability is brought here by writ of error, and the single question is, are the assessments complained of within the exempting words of the charter? I think that they are, and while recognizing to its fullest extent the indisputable doctrine relied on by the

vision made for the assessment of the property to be improved and benefited thereby, and special assessments levied for the payment by a species of taxation, because of the betterments

learned justice in his opinion below, that no person or corporation can be exempted from taxation, except by express words or necessary implication equally strong, I am constrained to admit that the legislative intent is in this instance too clearly and distinctly expressed to be open to doubt. In interpreting statutes, words must be taken in their plain and natural sense,— the sense given to them by approved and general usage. The exempting words here are 'taxes or assessments.' In popular acceptation, in legislative enactments and in judicial decisions, these words have a different meaning, apply to different matters, and cannot be treated as synonymous terms. This being so, no supposed impolicy of the exemption itself can be available to govern the judicial construction of the words. In the charter of Newark, under which the assessments were made, the word 'taxes' refers exclusively to impositions for general revenue for the public uses of the city, county or state. They are levied on principles not applicable to exactions for special benefits derived from local improvements, which exactions the charter exacts and denominates assessments. . . . The distinction in the legal meaning of the words is recognized and acted on in the decided cases in this state where the attempt has been made to obtain exemption from these special assessments on the ground that they were included within the word 'taxes.' These cases have been cited to sustain the judgment below, but they go wholly and decisively, I think, to a contrary result. They establish clearly that assessments are not taxes, in the ordinary legislative sense of the words. They so expressly declare. In the case of The City of Patterson v. The Society for Establishing Useful Manufactures, 4 Zab. 385, the expenses of grading and paving a street had been assessed upon lots owned by the defendants, and such assessments were held by the supreme court not to be a tax within the meaning of the defendants' charter, which exempted their property from 'all taxes, charges and impositions under the authority of the state.' It was said that the words 'taxes, charges and impositions,' specified in the charter, were manifestly those only for public or general use. The same view was taken in The State v. City of Newark, 3 Dutcher, 185. An assessment for benefits was discriminated from taxes or impositions. In neither case was the word 'assessments' employed in the exempting clause of the charter. This recognition by our own courts of the essential difference between the words 'taxes' and 'assessments,' as expressive of essentially different things, would seem to be conclusive against holding them, in this case, to be simply identical in meaning. Unless so held, the assessment in this case is plainly illegal. The distinction between them is fully exhibited in the case of Emery v. San Francisco Gas Co. 28 Cal. 345, where the above mentioned decisions of this state are cited, among others, to illustrate and enforce it. The language of the court was as follows: 'The different significations of the terms taxes and assessments will be found upon examination to be well established in the legal language of the several states, and to run through the statutes, and

that would accrue to the property.[1] Each and all of these matters have been legislated on, and may be properly treated of here.

§ 189. Taxes to aid in construction of railroads — Jurisdiction.— There can be no doubt, however it may be deplored, that the legislature has the power to pass laws permitting villages, cities and townships to subscribe for stock and to vote taxes and assessments in aid of railway companies, to construct a railway through or near them, and in aid of the construction of such railway. The validity of such laws has been declared in so many cases that a very few authorities are sufficient to establish the rule set forth.[2] It is the rule, however, that express power must be conferred upon the corporation or body politic by the legislature to subscribe for the stock, issue bonds, vote taxes and assessments in aid of these enterprises, and that no power will be or can be implied to permit municipalities to become stockholders in railways or incur indebtedness on account of such subscription; and the statute

to have been recognized and enforced by the various judicial tribunals of the country, and to have found their way into the constitution of many of the states.' See last note to last section; also Smith v. Farrelly, 52 Cal. 80. The rule that it is within the constitutional power of the legislature to confer upon municipal corporations the power to make local assessments upon lot-owners to pay for property taken under the exercise of eminent domain, and to authorize a tax on the property specially benefited for the cost of the property taken and improvements made, has been established by many decisions. See Commonwealth v. Woods, 44 Pa. St. 118; Stroud v. Philadelphia, 61 Pa. St. 255; Scovill v. Cleveland, 1 Ohio St. 126; Longworth v. Cincinnati, 34 Ohio St. 101; Burlington v. Quick, 47 Iowa, 222; People v. Brooklyn, 4 N. Y. 419; Nichols v. Bridgeport, 23 Conn. 189; Weckler v. Chicago, 61 Ill. 142; Peay v. Little Rock, 32 Ark. 31; Greeley v. People, 60 Ill. 19; Cleveland v. Wick, 18 Ohio St. 303; Dillon on Munic. Corp. sec. 617. See, for a very hard case, Rogers v. St. Charles, 54 Mo. 229; Mills on Em. Dom. secs. 149–158; Lewis on Em. Dom. secs. 405–478.

[1] Cooley on Taxation, pp. 423, 424; Hatch v. Pottawattamie Co. 43 Iowa, 442; Cooley, Const. Lim. 510; Dillon on Munic. Corp. (4th ed.) 617; Mills Co. Nat. Bank v. Mills Co. 67 Iowa, 697; Lambert v. Mills Co. 58 Iowa, 666; Chambliss v. Johnson, 77 Iowa, 611.

[2] Railroad v. Otoe County, 16 Wall. 667; Sharpless v. Mayor, 21 Pa. St. 147; Snell v. Leonard, 55 Iowa, 553; King v. Wilson, 1 Dillon, C. C. 555; Baldwin v. Otoe Co. 111 U. S. 1; Leavenworth Co. v. Miller, 7 Kan. 479; 12 Am. Rep. 425; Concord v. Robinson, 121 U. S. 165; Jonesboro City v. Cairo & St. L. R. Co. 110 U. S. 192.

authorizing such action will be strictly interpreted. The exercise of the power, being in derogation of common law, cannot receive aid by the courts, inasmuch as the power itself is an abnormal one, being foreign to the purposes for which such corporations are organized.[1] The power does not extend to private

[1] Dillon on Munic. Corp. (4th ed.) secs. 153–5, where the law is sustained but the principles on which it rests pronounced baneful and vicious, and declared a mania for running in debt, an "epidemic insanity," inducing extravagance for corporations and the reckless expenditure of money belonging to others, creating a debt for posterity to pay. A city cannot become a stockholder in a railway company unless the power is expressly conferred upon the corporation. Kelley v. Milan, 127 U. S. 150: "The bonds in question were issued in payment of a subscription made by the town to the stock of the Mississippi Central Railroad Company. On their face they do not recite any such subscription to stock, but recite, as the consideration for the bonds, 'the location of the Mississippi Central Railroad by said town.' It is well settled that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred upon it by a grant from the legislature, and that even the power to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment of the subscription, unless the power to issue such bonds is expressly or by reasonable implication conferred by statute. Such is the law as recognized by the supreme court of Tennessee in the case of Pulaski v. Gilmore, decided in 1880, and published in 21 Fed. Rep. 870, and in Tax-payers of Milan v. Tennessee Cent. R. R. Co. 11 Lea, 330, decided in 1883. Such is also the law as established by this court. Marsh v. Fulton Co. 10 Wall. 676; Wells v. Supervisors, 102 U. S. 625; Ottawa v. Carey, 108 U. S. 110, 123; Daviess Co. v. Dickinson, 117 U. S. 657, 663. The grant of authority to a municipal corporation to subscribe for the stock of a railroad company does not carry with it the power to issue negotiable bonds to pay for the subscription, or anything more than the power to raise money by taxation to pay the amount of the subscription. If, in the statute granting the power to subscribe for the stock, no manner of paying the subscription is provided for, it cannot be paid by issuing negotiable bonds." Hill v. Memphis, 134 U. S. 203: "All grants of power in such cases to subscribe for stock in railways are to be construed strictly and not to be extended beyond the terms of the law. Whilst a municipal corporation authorized to subscribe for the stock of a railroad company or to incur any other obligation may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. In Claiborne Co. v. Brooks, 111 U. S. 400, 406, this doctrine is reiterated and reaffirmed with emphasis. Said the court: 'Our opinion is that mere political bodies, constituted as counties are for the purpose of local policy and administration, and having the power of levying taxes to defray all public charges created, whether they are or

enterprises, and the property of a citizen cannot be taken or taxes levied to aid them. The fact that they may be remotely in the interest of the public is not sufficient. The right of municipal corporations to contract depends on and is limited by the right to tax, and if the tax cannot be lawfully levied to discharge a contract the latter is void.[1] Where such taxes

are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it.'" See, also, Kelley v. Milan, 127 U. S. 139; Young v. Clarendon Tp. 132 U. S. 340, 347; Pulaski v. Gilmore, 21 F. R. 870; Milan v. Central R. R. Co. 11 Lea, 330; Wells v. Supervisors, 102 U. S. 625; Ottawa v. Cary, 108 U. S. 110; Daviess Co. v. Dickinson, 117 U. S. 657; Penn. R. R. Co. v. Philadelphia, 47 Pa. St. 189, a leading case. The legislature may before, if not, indeed, after the subscription is made, but before it is paid for, annul the subscription and proceedings and authorize its withdrawal and release the right to the stock subscribed. People v. Coon, 25 Cal. 635; Aspinwall v. Daviess Co. 22 How. 364; Clark v. Des Moines, 19 Iowa, 199. See Hanson v. Vernon, 27 Iowa, 28, which, while overruled on main question in case, is still authority.

[1] Loan Association v. Topeka, 20 Wall. 659: "If these municipal corporations, which are in fact subdivisions of the state, and which for many reasons are vested with *quasi* legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source. But such instances are few and exceptional, and the proposition is a very broad one that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can be lawfully levied to pay the debt the contract itself is void for want of authority to make it. If this were not so these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature which created them can confer no such power. The validity of a contract which can be only fulfilled by a resort to taxation depends on the power to levy the tax for that purpose. It is therefore to be inferred that, when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the

are authorized to be voted by the electors or property owners, every provision of the statute must be fulfilled strictly to the letter, and the election, as well as subsequent proceedings, must be held and taken in strict accordance with it; the election must be carried by a majority vote, and everything done in strict compliance with the law.[1] The election may be ren-

debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." Parkersburg v. Brown, 106 U. S. 487; Cole v. La Grange, 113 U. S. 1; Lowell v. Boston, 111 Mass. 454.

[1] Where notice of the election did not state to what point the road shall be completed, as required by statute, the tax held void. Allard v. Gaston, 70 Iowa, 782. A majority of the votes cast at the election does not mean a majority of the voters voting for or against the tax at such election, where the vote is cast at a general election, but a majority of all voting at all. State v. Bechel, 22 Neb. 160: "It is contended on the part of plaintiff that the proposition submitted received the consent of a majority of the electors for the reason that a majority of the votes cast upon this particular question were in the affirmative, and that the vote deposited in the ballot-box prepared for the reception of ballots cast upon the proposition should, for the purpose of the canvass, be taken as the full vote of the city, while it is contended by defendant that consent in such case cannot be considered as given unless it appears that a majority of all the electors in the city, as shown by the registry, is in favor of such consent. It is also contended that if such is not the law, yet it appears that the affirmative of the proposition did not receive a majority of the votes cast at the election, and that therefore the writ should not be awarded. . . . It is believed that where an election is held upon such submission, and a majority of the votes cast are in favor of the proposition, this should be taken as giving the required consent. For a review of the authorities upon this question, in addition to those cited by counsel, we cite the case of State v. Babcock, 17 Neb. 188. But our attention must be given to the second contention of defendant, *i. e.*, that the affirmative of the proposition did not receive a majority of all the votes cast at the election, and that it was therefore defeated. . . . How can it be said that the fact that another ballot-box was prepared into which the ballots were deposited, to be counted as cast upon the proposition in question, would produce a different legal result than if the proposition had been written or printed on the tickets for the general election, and only one thousand six hundred and fifty of the voters had voted upon the question. We confess our inability to divide or separate the election of the day named, and must hold that it constituted but one election. That being the case, a majority of the votes cast at such election were not in favor of the constructing and operating such proposed street railroad as required by the law of the state, and the consent of a majority of the electors was not given." See McDowell v. Cons. Com. 96 N. C. 514; Wright v. Bishop, 88 Ill. 302; Edwards v. People, id. 340; People v. Clayton, id. 45; People v. Oldtown, id.

dered null and void because of fraud in procuring votes by

202; People v. Supervisors, 67 Ill. 57. Harding v. Rockford, etc. R. R. Co. 65 Ill. 92: In delivering the opinion of the court, Thornton, J., remarks: "Such municipalities were not created with the view to engage in commerce or to aid in the construction of railways, but for governmental purposes only. When they exercise the functions given by the statutes under consideration, the powers granted must not only be clearly conferred, but strictly pursued. If the mode prescribed for carrying into effect the right to issue bonds is not complied with in all material matters, then the bonds should not be issued, and thus the tax-payer will be exempt from the imposition of illegal taxes and a grievous burden upon his property. These principles have been so elaborately discussed and fully settled by this court that we need only to refer to some of the cases. People v. Tazewell County, 22 Ill. 147; Fulton Co. v. Mississippi & Wabash R. R. Co. 21 Ill. 338." Middleport v. Ætna Life Ins. Co. 82 Ill. 562. If aid has been conditionally voted, the condition must be complied with before the company can demand the aid. R. R. Co. v. Hartford, 58 Me. 23; Cowdrey v. Town of Caneadea, 16 Fed. Rep. 532; Rich v. Town of Mentz, 19 Fed. Rep. 725. The decision of the trustees authorizing an election on finding the petition was signed by one-third of the tax-payers is reviewable by *certiorari*. Jordan v. Hayne, 36 Iowa, 15: "The defendants insist that *certiorari* is not the proper proceeding in which the questions raised by the petition may be determined. We think differently. The action of the township trustees was of a judicial or *quasi*-judicial character, and whether it was illegal or without jurisdiction may be determined in this proceeding. See McCord v. High, 24 Iowa, 345; Edgar v. Greer, 14 id. 211; Parks v. Mayor of Boston, 8 Pick. 218; Wood v. Peake, 8 Johns. 69; People v. Mayor of Brooklyn, 9 Barb. 555; Betts v. City of Williamsburgh, 15 id. 255; Le Roy et al. v. Mayor of New York, 20 Johns. 429; People v. The City of Rochester, 21 Barb. 656; Starr v. Trustees of Rochester, 6 Wend. 564. . . . Upon the question of the sufficiency of the petition, whether it contained the names of one-third of the resident tax-payers, I do not think that adjudication of the trustees is final. If it should appear from the return to the writ that such fact was not shown to the trustees, or, perhaps, that it was shown by insufficient evidence, in either case the action of the trustees would be set aside, although they had determined that the petition was sufficient. Their decision upon the question of their own jurisdiction may be reviewed by this court. The trustees may decide this jurisdictional question of the sufficiency of the petition upon their own knowledge, if from their personal knowledge of the people and property of their township, or if from records which do contain evidence upon this question, they personally know that the petition does contain the necessary number of signers who are resident tax-payers of the township, they are authorized to order an election as provided for by the statute." Collins v. Davis, 57 Iowa, 256, where petition signed by only half of the voters in place of majority. Slack v. Blackburn, 64 Iowa, 374: "Conceding the foregoing proposition, the contention of the appellees is that the proceedings and judgments of all courts, whether of general or limited jurisdiction, are void, if it affirma-

false statements and representations of the railway officers, or by bribery and undue influence.[1]

tively appears that jurisdiction did not attach. Seely v. Reid, 3 G. Greene, 374; Gaylord v. Scarff, 6 Iowa, 179; Walker v. Kynett, 32 id. 524; Hamilton v. Millhouse, 46 id. 74. Without in any respect calling in question the correctness of the decision in either case, we desire to call attention to State v. Berry, 12 Iowa, 58, and add the query whether there is or is not a conflict between it and Ryan v. Varga R. R. Co. 37 Iowa, 78. The latter case was determined on demurrer to the petition. The present case is submitted on the evidence, and therefrom we must determine whether the trustees had the power and jurisdiction to submit the question of taxation to the voters." State v. Berry, 12 Iowa, 58, important.

[1] Sinnett v. Moles, 38 Iowa, 28: "It is charged that the signatures to the petition upon which the trustees ordered the vote were, in many instances, procured by fraudulent representations whereby voters were induced to sign the same, that the election was ordered because of false representations made to the trustees, and finally, through like fraudulent and false statements and misrepresentations of fact, the proposition was adopted at the election, the electors being deceived and induced thereby to vote for the proposed aid to the railroad. It may be stated as a general proposition, that every obligation whereby one may become bound to do an act is annulled and defeated, if it be obtained by the fraud of the party asking to enforce it, or for whose benefit it is sought to be enforced, or with his knowledge and consent. 'Fraud avoids a contract *ab initio*, both at law and in equity, whether the object be to deceive the public or third persons, or one party endeavor to cheat the other. For the law will not sanction dishonest views and practice by enabling an individual to acquire, through the medium of his deceptions, any right or interest.' Chit. Contr. 678. All transactions of men are rendered invalid by fraud, and courts will enforce no claims based thereon." Curry v. Supervisors, 61 Iowa, 71. Undue influence on voters. C., M. & St. P. R. R. Co. v. Shea, 67 Iowa, 735: "The defendants appealed from the decision of the court holding that the taxes voted in Lost Island township were invalid. The court, we presume, held that the collection of the taxes in this township could not be enforced because of the following facts: The citizens of the town of Emmetsburg appointed a committee to take charge of and work up the tax. George B. McCarty was one of such committee. Afterwards the railroad company entered into a contract with the persons so appointed, by the terms of which the company agreed to pay the persons composing the committee five per cent. of all the taxes voted, to the amount of $40,000, in consideration of which they were to procure petitions to be circulated, to see that elections were called, to look after the company's interest in said local-aid matters, and see that the voters were out at elections, and see that all necessary steps were taken to secure said local aid. McCarty was at the election in said township, and made a proposition to the voters that if they voted the tax for the railroad they would pay them fifty cents on the dollar for each dollar they voted on tax. Or, as another witness testifies, the proposition was

§ 190. General review of the doctrine of eminent domain as to jurisdiction.— Before closing this chapter we will review in a general way the rules pertaining to the law of eminent domain from a jurisdictional point of view as they are found in the adjudicated cases. The essential elements of jurisdiction are the same in this class of actions as in other actions created by statute, (but not in actions at common law,) where a new right of action is given and a particular remedy prescribed. In general, the jurisdiction is acquired by presenting to the proper tribunal a petition in conformity with the statute, setting forth by legal averment all the facts necessary to authorize the tribunal to act, serving the necessary notice and making all persons parties who have any interest in the property sought to be acquired.[1] It is a rule of law that the

'that all who voted for the tax, when they paid it, and presented their certificates to a certain party here in town, they would buy the certificates and pay fifty cents on the dollar. This proposition only included resident tax-payers and voters. The evidence further shows that prior to the proposition the expression of the voters was against the tax. There were only fourteen votes cast at the election, and all were in favor of the tax. These voters, or some of them, testify that they intended to vote against the tax, but changed their minds after the proposition was made. Counsel for the defendants do not claim that the proposition made did not unduly influence the voters, but their contention is that McCarty made the proposition in his own behalf, and not for the company, and that he was not authorized to bind or compromise the company in this respect. Under the contract as we read it, McCarty was an agent of the company, and fully authorized to do whatever he deemed necessary to obtain votes for the tax. For whom he made the proposition we are uncertain,— that is, who was to pay the tax-payers,— but this is immaterial. He made the proposition for the purpose of effectuating the purpose contemplated in the contract, and we think the corporation is bound by what he did. He was authorized and directed to see 'that all necessary steps were taken to secure local aid.' His determination of what was necessary is binding on the company." Alienation of the road will avoid the tax when made before the tax is collected, when the tax-payers are to have stock to the amount of tax. Manning v. Mathews, 66 Iowa, 675; Blunt v. Carpenter, 68 Iowa, 265. Representations to deceive voters vitiates tax. Lamb v. Anderson, 54 Iowa, 190.

[1] Cooper v. Sutherland, 3 Iowa, 114; Morrow v. Weed, 4 Iowa, 77. State v. Berry, 12 Iowa, 60: "The record of this court, which was introduced by the state and relied upon as showing the establishment of the road which it is claimed was obstructed, fails to show that a petition was ever filed or any notice ever given of the application or establishment of the road, as was required by the law then in force. The board of commission-

jurisdiction exercised in cases for the condemnation of property for public use is always of a special character, and the proceedings must be conducted in accordance with the mode pointed out by statute. The jurisdiction acquired consists of

ers, as a county court, had exclusive jurisdiction in the laying out and establishment of county roads. It was a court of record, but of inferior and limited jurisdiction, and no presumptions obtain in favor of the regularity of its proceedings unless it fully appears that it had first acquired jurisdiction in the manner prescribed by law. The doctrine of presumptions in favor of the regularity of the proceedings of a court of inferior jurisdiction is so fully discussed by Woodward, J., in the cases of Cooper v. Sunderland, and Morrow v. Weed, that we deem it unnecessary to do anything further than to refer to authorities there cited and the conclusions arrived at, as applicable to this case. From the reasoning of the court in the cases there referred to, we think the rule indicated is this: That where an inferior tribunal has exclusive jurisdiction over any subject, expressly conferred by the legislature, and where it has acquired jurisdiction over such subject-matter in the manner prescribed by law, that every presumption thereafter is in favor of the legality of its proceedings, and that any objections to the irregularity of its action cannot be raised collaterally but must be upon appeal or *certiorari*. Where, however, the record shows, as in this case, that such court never acquired jurisdiction, no presumption obtains in its favor. We do not undertake to say that in this case it was necessary for the state to have introduced the petition and notice which gave to the court its authority to establish the road, but it should appear in some manner from the record that a petition was filed and a notice given; as without that the court could not acquire jurisdiction." Plummer v. Waterville, 32 Me. 566; Warne v. Baker, 35 Ill. 382. Spofford v. B. & B. R. R. Co. 66 Me. 89: "But, in the exercise of the right of eminent domain, a grant by the legislature to a corporation to take private property as for public uses, being in derogation of the common-law right of the citizen to hold and enjoy his property, it is to be construed strictly, and, to justify its taking, it must be shown that all the provisions of the statute in that respect have been fully complied with. This rule of construction is so well settled as to need no citation of authorities. Another rule of construction applicable to this statute is that in all grants made by the government to individuals, of rights, privileges and franchises, the words are to be taken most strongly against the grantee, contrary to the rule applicable to a grant from one individual to another. Another rule of construction is that in construing a statute all its parts are to be considered and such a construction adopted as will give force and effect to all its clauses, unless they are clearly repugnant to each other. 'But after all,' says Shaw, C. J., in Cleaveland v. Norton, 6 Cush. 380, 'the best ground of exposition is to take the entire provisions of the act, and ascertain, if possible, what the legislature intended.'" In re Grove St. 61 Cal. 438. The allegations of petition must be positive. Hays v. Campbell, 17 Ind. 430. All the requirements of the statute must be complied with. Powers

consecutive steps in that mode to the final determination; hence, the jurisdiction may be lost by any material departure from the mode prescribed by the law giving the power; therefore, the entire proceedings must be conducted with substan-

v. Irish, 23 Mich. 429. Description of property. Matter of New York R. R. Co. 70 N. Y. 191. Petition should show that property is within the jurisdiction. Schoff v. Upper Conn. River Co. 57 N. H. 110; Collins v. Rupe, 109 Ind. 340; Bassick Mining Co. v. Schoolfield, 10 Colo. 46. Jurisdiction, as applicable to a state, is the authority to declare and the power to enforce the law, as well as the territory within which such authority and power may be exercised, and the jurisdiction of a state is co-extensive with its sovereignty. Sanders v. St. Louis Anchor Line, 97 Mo. 26. To render a judgment binding the court must have jurisdiction over the parties as well as over the subject-matter, and jurisdiction of courts of general powers will be presumed until the contrary is shown, but jurisdiction of courts of limited powers must affirmatively appear; still, it must be kept well in mind that courts of general jurisdiction stand upon the same footing as courts of special or limited jurisdiction when not acting within the scope of their general powers, but under general statutory powers. Richardson v. Seevers, 84 Va. 259. And where no jurisdiction exists in a court, in point of law, to hear and determine a case, the consent of the parties will not confer jurisdiction. Applegate v. Dowell, 15 Ore. 513; McNeill v. Hodges, 99 N. C. 248. The presumption is that a court of limited or inferior jurisdiction is without jurisdiction when the jurisdiction does not appear, and the jurisdictional facts are not alleged in the complaint in an action therein. Gilbert v. York, 111 N. Y. 544. But the contrary rule is true as to court of record of general jurisdiction. English v. Woodman, 40 Kan. 752; City of St. Louis v. Lanigan, 97 Mo. 175; Hilton v. Bachman, 24 Neb. 490. The recital in the record by the court that the defendants in the proceedings named had been served with process is evidence that they had been so served, and that the court had jurisdiction over their persons. Brickhouse v. Sutton, 99 N. C. 103; 6 Am. St. Rep. 497. And it has even been held that such a recital is not only evidence of service but conclusive evidence of the fact. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742 and note 765 *et seq.*; note to Melia v. Simmons, 80 Am. Rep. 748–752. But the record recitals in the judgment entry as to the service of the summons are not conclusive where the return found in the rolls is fatally defective. Blodgett v. Schaffer, 94 Mo. 652. But see Adams v. Cowles, 95 id. 501; 6 Am. St. Rep. 74 and note 79. There must be notice. C. & A. R. R. Co. v. Smith, 78 Ill. 96–99, holding, "it is a rule of general application that a party cannot be deprived of his rights without having notice and an opportunity to be heard." Toledo R. R. Co. v. R. R. Co. 62 Mich. 564: "The petitioner asks to have condemned more than the statute authorizes. It seeks for a condemnation of the title to the land in the right of way sought to be obtained for the purpose of making a crossing. At most, the petitioner could only obtain the right to cross the respondent's road with its track and cars, and whatever was incident and

tial regularity to the end.[1] It is an elementary principle, as we have shown, that where a court exercises special statutory jurisdiction there is no presumption indulged in favor of such jurisdiction, even where the proceedings are in courts of record; and this rule has been applied to such courts and in condemnation proceedings with great unanimity.[2] It is very material to determine in just what the error consists; if the statute has not been complied with in a matter going to some essential particular relating to the taking of the property, particularly to a matter bearing on the power of the court — the omission of material matter that should appear in the petition or other initiatory proceeding being a condition precedent to the taking — such omission is fatal to the jurisdiction.[3]

necessary to the crossing. Howell's Stat. sec. 3323, subd. 6; Laws of 1883, act 174, sec. 36; Grand Rapids R. R. Co. v. Grand Rapids R. R. Co. 35 Mich. 265; 24 Am. Rep. 545; Central R. R. Co. v. Hudson R. R. Co. 46 N. J. L. 289; Stone v. Commercial R. R. Co. 4 Mylne & C. 122. It fails to describe the rights and franchises it may condemn under the statute or that petitioner wishes to condemn. It has a right to secure a crossing for its road-bed and cars, and make the necessary connection with the other company's track for this purpose, and it may also secure the right to cross the respondent's road with sidetracks, and obtain the use of its right of way for the location of switches, provided such use is not inconsistent with the use of the road under the respondent's franchise. These rights, however, are not described in the petition, nor are they asked to be condemned. The right to the title to sixty-six feet in length of the respondent's right of way is the property described in the petition, and nothing else. Such a description in the petition for the purpose of obtaining a right to cross another railroad is fatally defective. Grand Rapids R. R. Co. v. Grand Rapids R. R. Co. *supra;* Lake Shore R. R. Co. v. Chicago R. R. Co. 97 Ill. 506; White River Turnpike Co. v. Vermont Cent. R. R. Co. 21 Vt. 590; Eastern R. R. Co. v. Boston R. R. Co. 111 Mass. 128; Vail v. Morris & E. R. Co. 21 N. J. L. 189; Ind. R. R. Co. v. Newsom, 54 Ind. 121; Chicago R. R. Co. v. Sanford, 23 Mich. 428. I do not think the probate court ever obtained jurisdiction in the case."

[1] State v. Molly, 18 Iowa, 525; Northampton v. Abel, 127 Mass. 507; Lund v. New Bedford, 121 Mass. 286. The commissioners must have the requisite qualifications. State v. Horn, 34 Kan. 556. Sec. 191, note 2.

[2] See note 1, this section. Prentiss v. Parks, 65 Me. 559; Nichols v. Bridgeport, 23 Conn. 189; Zimmerman v. Snowden, 88 Mo. 218; State v. Officer, 4 Ore. 180; White v. Memphis R. R. Co. 64 Miss. 566; North Pac. Ter. Co. v. Portland, 14 Ore. 24. But see where proceedings were in courts of record, C. B. & Q. R. R. Co. v. Chamberlain, 84 Ill. 333; Keyes v. Tait, 19 Iowa, 123; Cage v. Trayer, 60 Miss. 563; State v. Lewis, 22 N. J. L. 564.

[3] See note 1 above.

§ 191. How far the record may be supported or contradicted by parol evidence.— There is a conflict of authorities pertaining to the question as to how far the record may be contradicted by parol evidence upon the question of jurisdiction; but in the judgment of the writer, it is believed that the record may be contradicted or supported by parol evidence upon the question of jurisdiction of the subject-matter or of the defendant, in fact of the parties to the suit. If the court or tribunal lacked jurisdiction of the subject-matter of the suit for any cause, facts may be shown that tend to overthrow the jurisdiction assumed and defeat it in any court, with this exception: if the question has been drawn directly in issue by the defendant before the court trying the case, and the court has acted and determined the question, then the finding is final.[1] But if the facts necessary to jurisdiction

[1] People v. The Warden, 100 N. Y. 25: "The questions arising in this case are governed by the rule, favoring the widest latitude of examination, as the judgment assailed was rendered by a court of limited jurisdiction, and its authority, not only over the person of the relator, but also of the subject-matter, is disputed. Courts-martial and delinquency courts are tribunals of special and limited powers, having jurisdiction only of offenses against military discipline committed by persons belonging to the particular branch of the service for which such courts are organized. Sections 101-104, 123, chapter 299, Laws of 1883; Smith v. Shaw, 12 Johns. 257; Wilson v. Mackenzie, 7 Hill, 95; Mills v. Martin, 19 Johns. 7. It is expressly provided by section 40 of chapter 299, Laws of 1883, that no person under the age of twenty-one years shall be enlisted without the consent of his parent or guardian, and this requirement is thereby made the condition of a valid enlistment. The existence of such an enlistment thus constitutes a part of the subject-matter of the jurisdiction of the delinquency court, and in its absence the court has no authority whatever over the offense or the person proceeded against. It is, therefore, a fundamental requisite to the jurisdiction of such courts that the persons over whom they attempt to exercise authority shall have been duly enlisted and be legally subject to the obligations of military discipline. Judgments pronounced by them, when questioned in any collateral proceeding, are of no force or effect as establishing a right to enforce them, unless accompanied by proof of the jurisdictional facts upon which the authority of the court to render them depends. Such proof, whenever furnished, is always subject to the right of the person affected thereby to controvert it and establish, if he is able to do so, the want of jurisdiction of the court whose authority is disputed. Unlike courts of general jurisdiction, the recital of jurisdictional facts in their records does not furnish *prima facie* evidence even of their existence, but they must be affirmatively proved in order to establish

were not directly made an issue by the defendant and were

the validity of the judgments rendered. It has been sometimes claimed, and is indeed supported by the authority of cases in some of the sister states and in England, that the recital of jurisdictional facts in the judgments of courts of general jurisdiction furnishes conclusive evidence of their existence, and precludes any inquiry into their existence when collaterally brought in question; but the weight of authority in this state seems to be against the proposition and to the effect that such recitals are *prima facie* evidence only of the facts recited. Ferguson v. Crawford, 79 N. Y. 265; Bloom v. Burdick, 1 Hill, 130; People v. Cassels, 5 id. 164. With reference to courts of limited and inferior jurisdiction, however, whether the record recites the jurisdictional facts or not, it has uniformly been held that their judgments are open to impeachment by extrinsic evidence showing want of jurisdiction whenever they are sought to be used by way of defense or as a justification to persons seeking to enforce them. Adams v. S. & W. R. R. Co. 10 N. Y. 328; Smith v. Shaw, *supra;* Mills v. Martin, *supra;* People v. Cassels, *supra;* Greenleaf on Evidence, 470. When, however, a court has jurisdiction of the subject-matter and has acquired jurisdiction of the person by the service of proper process or the voluntary appearance of the party, it is competent for it to try and determine all questions within the issue arising during the course of the trial, and its decisions thereon can be reviewed only on appeal in a direct proceeding having that object in view." Fanning v. Krapfl, 68 Iowa, 244. Adams v. Saratoga, etc. 10 N. Y. 332: "Now it is not necessary to decide whether this order or decree is evidence of the facts recited in it, within the meaning of Sharp v. Speir, 4 Hill, 76; Jackson v. Esty, 7 Wend. 148; Varick v. Tallman, 2 Barb. 119, and Stryker v. Kelly, 2 Denio, 323, so as to supersede the necessity of proving the existence of the facts on which alone the jurisdiction of the county judge was made by the act to depend, for instituting the proceedings for assessment, and also for making the 'order or decree' which it is argued changes the title to the premises in question, and vests it in the corporation. I say it is not necessary to decide that question because I understand the plaintiff offered distinctly to disprove all the facts on which the jurisdiction of the judge rested for entertaining the proceedings, and also for making the decree or order which was given in evidence. This was a proceeding before an officer clothed with a subordinate power, given him by a statute, to take certain proceedings whenever a particular contingency arose, by which the title of a party to real estate should be divested, and the offer was to show that the contingency mentioned in the statute never arose. If the facts offered to be proved were admitted to be true, it would follow that the assessment of damages and the order or decree relied upon were *coram non judice*, and utterly void. It is a settled doctrine in this state that a party may show a want of jurisdiction in the court or officers over either the subject-matter or the person. Justice Marcy, in Starbuck v. Murray, 5 Wend. 156, 157. after saying 'that the jurisdiction of the court rendering a judgment may be inquired into,' declares 'that this doctrine does not depend merely on adjudged cases. It has a better foundation; it rests on a principle of natural justice. No man is to be condemned

not passed upon, except incidentally, such jurisdictional facts

without the opportunity of making a defense, or to have his property taken from him by a judicial sentence without the privilege of showing, if he can, the claim against him to be unfounded.' So, too, in the case of Bloom v. Burdick, 1 Hill, 139, the court, after laying down the same doctrine, say: 'This is the rule in relation to all courts, with only this difference: that the jurisdiction of a superior court will be presumed until the contrary appear; whereas, an inferior court, and those claiming under its authority, must show that it had jurisdiction.' Such is the doctrine of the courts in this state and of the United States (Williamson v. Berry, 8 How. 495), although it may be different in some of the other states (2 Am. Lead. Cas. 786–793), and, perhaps, also in England. 2 Cow. & Hill's Notes, 1016, 1017. The defendant insists that the order is conclusive evidence of any fact stated in it on the ground that the matter on which the jurisdiction depends is the very matter which was in issue before the court or officer. 12 Pick. 572, 573; 2 Cow. & Hill's Notes, 1016–1023. Now, if this case should be admitted to belong to that class of cases, which is at least questionable, it must still be remembered that the defendant is at liberty to show that jurisdiction was never obtained over the person of the defendant. The idea is not to be tolerated that the attorney could make up a record or decree, reciting that due notice was given to the defendant of the proceeding when he never heard of it, and no notice was published, and the decree held conclusive against an offer to show this vital allegation false." Walker v. Sleight, 30 Iowa, 310; People v. Hurlbut, 46 N. Y. 110; Leavitt v. Eastman, 77 Me. 117. Rose v. Himely, 4 Cranch, 268: "The court pronouncing the sentence of necessity decided in favor of its jurisdiction, and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country. This proposition certainly cannot be admitted in its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether the sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered. But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty whether the situation of the particular thing on which the sentence has passed may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing sentence. If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded. Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its

may be contested.[1] A court does not, by passing on a ques-

sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all." See Hunt v. Hunt, 72 N. Y. 227-8, holding every state has the right to determine the *status* or domestic and social condition of persons domiciled within the territory. A court may, if it has acquired jurisdiction over the subject-matter and the parties, determine its own jurisdiction otherwise, and its findings are conclusive where the question relates to or depends upon its own municipal laws, and it is the exclusive judge of such laws of its own territory. See Gurnsey v. Edwards, 26 N. H. 224; Roehrborn v. Schmidt, 16 Wis. 519. See *ante*, § 2, note 1. And also In re Grove St. 61 Cal. 438; Jackson v. State, 104 Ind. 516; Freeman v. Hart, 61 Iowa, 525.

[1] Ferguson v. Crawford, 70 N. Y. 265: "In the Chemung Canal Bank v. Judson, 8 N. Y. 254, the general principle is recognized that the jurisdiction of any court exercising authority over a subject may be inquired into; and in Adams v. Saratoga R. R. Co. 10 N. Y. 328, Gridley, J., maintains as to the judgments of all courts, that jurisdiction may be inquired into and disproved by evidence, notwithstanding recitals in the record, and says that such is the doctrine of the courts of this state, although it may be different in some of the other states, and perhaps also in England; and he says the idea is not to be tolerated that the attorney could make up a record or decree reciting that due notice was given to the defendant of the proceedings when he never heard of it, and the decree held conclusive against an offer to show this vital allegation false. That was a case of a special proceeding, and therefore not an authority on the point. In Pendleton v. Weed, 17 N. Y. 75, where a judgment of the supreme court was sought to be attacked collaterally, it is said by Strong, J.: 'It is undoubtedly true that the want of jurisdiction of the person is a good defense in answer to a judgment when set up for any purpose, and that such jurisdiction is open for inquiry;' and by Comstock, J., at page 77: 'I assent to the doctrine that where there is no suit or process, appearance or confession, no valid judgment can be rendered in any court, that in such a case the recital in the court record of jurisdictional facts is not conclusive;' citing Starbuck v. Murray. 'I think it is the right of a party against whom a record is set up, to show that no jurisdiction of his person was acquired and consequently that there was no right or authority to make up the record against him.' Selden and Pratt, JJ., concurred in these views, but the case was disposed of on a different point. In Porter v. Bronson, 29 How. Pr. 292; S. C. 19 Abb. Pr. 236, the court of common pleas of the city of New York held, at general term, that as claiming the marine court to be a court of record, a defendant in an action on a judgment of that court might set up that he was not served with process and did not appear, notwithstanding recitals in the record showing jurisdiction; and in Bolton v. Jacks, 6 Rob. 198, Jones, J., says that it is now conceded, at least in this state, that want of jurisdiction will render void the judg-

tion pertaining to its own jurisdiction, by any holding it may

ment of any court, whether it be of superior or inferior, of general, limited or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and the party against whom a judgment is offered is not by the bare fact of such recitals estopped from showing, by affirmative proof, that they were untrue, and thus rendering the judgment void for want of jurisdiction. He cites in support of this opinion several of the cases which I have referred to, and Dobson v. Pearce, 12 N. Y. 164; Hatcher v. Rocheleau, 18 N. Y. 92; Hunt v. Hunt, 72 N. Y. 224." Craig v. Town of Andes, 93 N. Y. 410: "The general doctrine is well settled that the jurisdiction of any court exercising authority over a subject may be inquired into in any court where the proceedings of the former are relied upon and brought before the latter by the party claiming the benefit of such proceedings. This rule was laid down in Elliott v. Peirsol, 1 Pet. 328, and cited with approval by this court in Chemung Canal Bank v. Judson, 8 N. Y. 254. So far as this question is concerned, the only effect of the statute (sec. 2, *supra*) was to relieve the plaintiff from the necessity of showing, step by step, the proceedings which led up to the judgment, and place upon the defendant the burden of showing that no jurisdiction in fact existed in the county judge. The plaintiff, however, did not avail himself of the privilege. He treated the judge as an inferior tribunal and undertook to show the facts relied upon to give him jurisdiction. He left no room, therefore, for the presumption which would otherwise have required evidence from the defendant to remove. As the case stood it could show, if possible, not that the judgment was erroneous, but that it was void. In this it was properly successful, if the conditions on which that jurisdiction depended had not been fulfilled. Davidsburgh v. Knickerbocker L. Ins. Co. 90 N. Y. 526; Ferguson v. Crawford, 70 id. 253; People v. Liscomb, 60 N. Y. 568; People v. Spencer, 55 N. Y. 1. These cases go upon the ground that the record, whether of a superior or an inferior court, is never conclusive as to the existence of a jurisdictional fact, and that a defendant may show want of jurisdiction, although the record avers the contrary. Davis v. Packard, 6 Wend. 327; Bloom v. Burdick, 1 Hill, 130; People v. Cassels, 5 id. 164; Ferguson v. Crawford, *supra*. And quite applicable to the present inquiry is the declaration of Paige, J., in Hard v. Shipman, 6 Barb. 621, cited with approval in Ferguson v. Crawford, *supra*, 'that if the court had no jurisdiction it had no power to make a record, and the supposed record is not in truth a record.' Had the county judge then jurisdiction? This could only be conferred by the presentation of a petition conforming to the statute. Town of Wellsborough v. N. Y. & C. R. R. Co. 76 N. Y. 182; People v. Spencer, *supra*. Such petition would be absolute in form, and express, first, a desire that the town be bonded in a sum named; second, directions for the investment of the bonds or their proceeds in a specified security of the railroad company named in the petition. People v. Spencer, *supra*. The petition presented to the county judge and on which he acted is not within these

make or any finding erroneously made, give itself jurisdiction.[1] Jurisdiction is conferred by law, and it may be a mixed question of law and fact; therefore the finding of a court in favor of its own jurisdiction does not confer it.[2] The law alone con-

limits. Thirty-seven petitioners, representing in the assessment list property valued at $46,250, insert a 'condition that said road is located by Fish Lake and Shavertown;' six petitioners, representing $12,150 of property, insert a condition that it 'be located by Fish Lake and Shavertown or village,' and ten others, representing $13,050, that it be located 'by Shavertown and Lumberville.' These conditional petitioners constitute about one-fourth of all the petitioners and own more than that proportion of the property owned by all the petitioners, and excluding them there would remain on the petition much less than a majority either of taxpayers or property. . . . A petition that aid be extended to a railroad company provided a certain thing is done is very different from a simple petition that aid be extended to that company. It must also be borne in mind that this petition is to be addressed to the county judge, and that he has no power to accept or reject the condition, consequently none to make the petition effective. It has already been said by this court 'that the presentation of a proper petition lies at the basis of his jurisdiction,' and that if any facts, required to be stated, are omitted, all the other proceedings are fatally defective. In People v. Spencer, *supra*, the petition failed to state that the railroad corporation named was a domestic one, and on that ground the court reversed the adjudication of the county judge. In People ex rel. Grefen v. Smith, 55 N. Y. 185, the proceeding was under the act of 1871, which required the petition to show, in addition to the facts called for by the act of 1869, *supra*, that the petitioners were a majority of the tax-payers, 'not including those taxed only for dogs, or highways only;' and it was held that by reason of this omission the county judge acquired no jurisdiction of the proceedings, and that he could not, of his own motion, dispense with the performance of a condition precedent to the exercise of the authority conferred by the act. This decision was followed in a much later case (Town of Wellsborough v. N. Y. & C. R. R. Co. *supra*); and for the same defect in the petition it was held that the county judge acquired no jurisdiction, and that his orders in the subsequent proceedings were void."

[1] See n. 1, p. 594.

[2] Newcomb v. Dewey, 27 Iowa, 381; Stone v. Skerry, 31 Iowa, 582. People's Savings Bank v. Wilcox, 15 R. I. 260; 2 Am. St. Rep. 894: "We have come to the conclusion, after much consideration, that the rule applicable to courts of limited jurisdiction, which is the better established on principle and authority, is this: That where the jurisdiction depends on some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact may be averred of record and was actually found upon evidence by the court rendering the judgment. Chew v. Holroyd, 8 Ex. 249; Bunbury v. Fuller, 9 id. 111; Wanzer v. Howland, 10 Wis. 8; Clark v. Holmes, 1 Doug. 390; Holyoke v. Haskins, 5 Pick. 20; Jochumsen v. Sav. Bank, 8

fers jurisdiction over the subject-matter. The finding of a court does not confer it; and where an essential jurisdictional fact must appear or exist, such fact becomes at all times the subject of contest.[1] A probate court has jurisdiction over the estates of decedents. There can be no jurisdiction unless the owner of the estate is dead, and no finding can make a man dead in law when alive in fact; and the finding on such issue may be rebutted; it relates to the subject-matter; but where the question of fact upon an issue joined related to the identity of the claimant, a finding that the claimant was not the supposed decedent would be conclusive when made in the proper court in a direct issue against him.[2] Where the alleged want of jurisdiction arises over the question whether the defendant was served with process, a finding on that point, under an issue joined, would be conclusive; but not where the defendant sought to contradict the return of a sheriff, which is only *prima facie* evidence of the fact.[3] The same rule would apply to the question of residence, where such residence was jurisdictional, or any other fact not directly put in issue by the defendant himself. If the return of the sheriff was er-

Allen, 87; Culver's Appeal, 48 Conn. 165; Sears v. Terry, 26 id. 273; Fowle v. Coe, 63 Me. 245; Salladay v. Bainhill, 29 Iowa, 555; Wyatt's Adm'r v. Rambo, 29 Ala. 510; Wilson v. Frazier, 2 Humph. 30; Johnson v. Corpenning, 4 Ired. Eq. 216; Moore v. Smith, 11 Rich. 569; Burns v. Van Loan, 29 La. Ann. 560; Miller v. Jones' Adm'r, 26 Ala. 247; Brown v. Foster, 6 R. I. 564. But, on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without, partly at least, retrying the case upon its merits, which is not permissible in a collateral proceeding. Brittain v. Kinnaird, 1 B. & B. 432; Regina v. Bolton, 1 Q. B. 66; Basten v. Carew, 3 Barn. & C. 649; Cave v. Mountain, 1 Man. & G. 257; Staples v. Fairchild, 3 N. Y. 41; Angell v. Robbins, 4 R. I. 492. The distinctions recognized in the rule as stated seem to have been observed by this court in deciding the cases of Brown v. Foster, 6 id. 584, and Angell v. Robbins, 4 id. 493, above cited." See cases cited in note 1, p. 594.

[1] Blodgett v. Schaffer, 94 Mo. 652; Dubuc v. Voss, 19 La. Ann. 210. See notes 1 and 2 above.

[2] See *ante*, p. 337, n. 5.

[3] The return of service may be contradicted although the decree recites that the court found due service on the inspection of the record. Hartley v. Boynton, 5 McCrary, 453; Lowe v. Lowe, 40 Iowa, 220; Clark v. Little, 41 Iowa, 497; Cooper v. Sunderland, 3 Iowa, 114; Morrow v. Weed, 4 Iowa, 77.

roneous, if an allegation appearing in the petition or declaration, where no process had been served, but the return showed service, was found, or any question pertaining to the jurisdiction of the subject-matter, essential to the jurisdiction, that should exist, does not exist, it may be shown by evidence *aliunde*. So, where the record does not show an essential jurisdictional fact that did exist, such record may be supported by the truth.[1]

[1] Note 1, p. 594.

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